Opinion of the Court of Appeals

United States Court of Appeals,
Eleventh Circuit.

Andrew L. MANNING, a minor, by his father and next friend, Willie MANNING, et al., Plaintiffs-Appellees,
v.
THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly Board of Public Instruction of Hillsborough County, Florida), et al., Defendants-Appellants.

No. 99-2049.

March 16, 2001.

***929** Walter Crosby Few, Few & Ayala, Thomas M. Gonzalez, Arnold B. Corsmeier, Thompson, Sizemore & Gonzalez, P.A., Tampa, FL, for Defendants- Appellants.

Victor Allen Bolden, Wiggin & Dana, New Haven, CT, Jacqueline A. Berrien, NAACP Legal Defense & Educational Fund, Inc., New York City, Warren Hope Dawson, Dawson and Griffin, P.A., Tampa, FL, for Plaintiffs-Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before BLACK, FAY and COX, Circuit Judges.

BLACK, Circuit Judge:

Appellants, the School Board of Hillsborough County, Florida, and its officials, appeal two orders of the district court which subject them to continued supervision under a federal desegregation decree. *See Manning v. Sch. Bd. of Hillsborough*

County, Fla., 24 F. Supp. 2d 1277 (M.D. Fla.), *mot. to alter or amend den., mot. for clarification granted in part,* 28 F. Supp. 2d 1353 (M.D. Fla.1998). Appellants argue that they have eliminated the vestiges of past discrimination to the extent practicable and have fully complied in good faith with the desegregation decree. Accordingly, Appellants claim their school district should be declared unitary and federal judicial supervision should cease. Conversely, Appellees, a class of African-American schoolchildren, contend the school district is not unitary and federal judicial oversight of Appellants remains necessary. We hold that Appellants have achieved unitary status. We reverse and remand for the district court to enter judgment, in accordance with this opinion, declaring the Hillsborough County school system to be unitary.

I. BACKGROUND

A. *Procedural History*

Appellants for many years operated a racially-segregated, dual school system. As a result of the Supreme Court's landmark decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (*Brown I*), Appellees in 1958 filed this class-action lawsuit on behalf of all "minor Negro children and their parents" residing in Appellants' school district.[1] In 1962, the district court found

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[1]The lawsuit was filed in the Southern District of Florida. In 1962, the Middle District of Florida was created, and the case was transferred to that court's docket on November 2, 1962. In a May 1971 order, the presiding district judge noted that this case was--in 1971--the oldest active case on the docket of the Middle District of Florida. Of course, the same holds true today.

The Honorable Thurgood Marshall, prior to his appointment to the Supreme Court, served as one of the attorneys for Appellees.

that Appellants, by operating a segregated school system, had violated the Fourteenth Amendment. For the next ***930** eight and half years, the district court issued various orders as part of its efforts to remedy the harm caused by Appellants' unconstitutional conduct. *See, e.g., Mannings v. Bd. of Pub. Instruction of Hillsborough County, Fla.*, 306 F. Supp. 497 (M.D. Fla.1969).

In 1970, our predecessor court examined whether Appellants had sufficiently eradicated the illegal dual school system such that it could be found "unitary." *See Mannings v. Bd. of Pub. Instruction of Hillsborough County, Fla.*, 427 F.2d 874 (5th Cir.1970). Relying upon the six so-called *Green*[2]

The lead plaintiff was, and still is, Andrew L. Manning; through the many years of litigation, his surname has frequently, and incorrectly, been spelled "Mannings." The institutional defendant was formerly known as the Board of Public Instruction of Hillsborough County. The following are the published opinions arising from this case: *Mannings v. Bd. of Pub. Instruction of Hillsborough County, Fla.*, 277 F.2d 370 (5th Cir.1960); *Mannings v. Bd. of Pub. Instruction of Hillsborough County, Fla.*, 306 F. Supp. 497 (M.D. Fla.1969); *Mannings v. Bd. of Pub. Instruction of Hillsborough County, Fla.*, 427 F.2d 874 (5th Cir.1970); *Mannings v. Sch. Bd. of Hillsborough County, Fla.*, 796 F. Supp. 1491 (M.D. Fla.1992); *Mannings v. Sch. Bd. of Hillsborough County, Fla.*, 816 F. Supp. 714 (M.D. Fla.1993); *Mannings v. Sch. Bd. of Hillsborough County, Fla.*, 149 F.R.D. 235 (M.D. Fla.1993); *Mannings v. Sch. Bd. of Hillsborough County, Fla.*, 149 F.R.D. 237 (M.D. Fla.1993); *Mannings v. Sch. Bd. of Hillsborough County, Fla.*, 851 F. Supp. 436 (M.D. Fla.1994). Additionally, a law review article is devoted exclusively to this litigation. *See* Drew S. Days, III, *The Other Desegregation Story: Eradicating the Dual School System in Hillsborough County, Florida*, 61 Fordham L. Rev. 33 (1992).

[2]*Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968).

factors, the former Fifth Circuit concluded that, with regard to three factors (transportation, extracurricular activities, and facilities), Appellants had indeed achieved a unitary school district. *See Mannings*, 427 F.2d at 878. Nonetheless, based on its examination of three other factors (faculty desegregation, staff desegregation, and student assignments), the court found Appellants had fallen short and had not attained unitary status. *See id.* The case was remanded to the district court with instructions to remedy the deficiencies. *See id.*

After remand, the Supreme Court, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), gave firm guidance on a district court's equitable power to remedy illegal segregation. On May 11, 1971, just 21 days after *Swann* was decided, the district court directed Appellants to submit a comprehensive desegregation plan that conformed with the requirements of *Swann*. Thereafter, Appellants submitted such a plan, and the district court adopted the plan in its order dated July 2, 1971 (the July 1971 Order). From 1971 to 1991, the district court's supervision of Appellants was governed, with some minor modifications, exclusively by the July 1971 Order.[3]

In 1991, Appellants and Appellees entered into a consent decree (1991 Consent Order). The primary reason for the 1991 Consent Order was to enable Appellants to reorganize the school district, so as to eliminate single grade centers and to create middle schools. The 1991 Consent Order, which was to be implemented over a 7-year period, did not annul the July 1971 Order, but merely modified it.

Appellee moved in 1994 to enforce the 1991 Consent Order. The matter was referred to the magistrate judge who

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[3]For a summary of the minor modifications, see *infra* note 6.

recommended denying the motion. The district judge, however, deferred ruling on the motion and *sua sponte* recommitted the matter to the magistrate judge to consider whether the school district had become unitary, thereby removing the need for federal judicial oversight.

In October 1996, the magistrate judge conducted a 7-day hearing, at which both sides presented considerable evidence. In August 1997, the magistrate judge issued a detailed report and recommendation wherein she recommended the district court find that Appellants had achieved unitary status and thus should be released from federal judicial supervision. Without holding an evidentiary hearing, the district judge in a 110-page order dated October 26, 1998, rejected in part and adopted in part the magistrate judge's report and recommendation. *See Manning*, 24 F. Supp. 2d at 1277-1335. The district judge concluded that Appellants had not attained unitary status and therefore federal judicial supervision was still warranted.[4] *See Manning*, 24 F. Supp. 2d at 1335. ***931** Within ten days of the order dated October 26, 1998, Appellants filed a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). The district court, in a 13-page order, denied the motion on December 4, 1998. *See Manning*, 28 F. Supp. 2d at 1361. Within 30 days, Appellants filed a notice of appeal as to the district judge's orders of October 26, 1998, and December 4, 1998.

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[4]Before the district court, Appellees also argued that, even if the school district were unitary, this status would not constitute a "changed circumstance" warranting a modification or vacation of the 1991 Consent Order. *See Manning*, 24 F. Supp. 2d at 1287-88 (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992)). The district court rejected Appellees' argument. *See id.* at 1288. Since Appellees do not contest this ruling on appeal, we do not address it.

B. *Facts*

To analyze this case that has endured for over 40 years, we first summarize the contents of the July 1971 Order and the 1991 Consent Order, which, with minor modifications, have served as the guideposts for Appellants' journey toward a unitary school district. Then, we set forth the district court's most recent factual findings with respect to Appellants' unitary status.

1. *July 1971 Order*

As previously discussed, the district court ordered Appellants in May of 1971 to submit a comprehensive desegregation plan. The district court stated that the "primary objective" of the plan should be the abolition of segregation. In particular, the district court sought to eliminate, at every school, racial balances where black students comprised more than 50% of the student population. The district court further stated that the "most acceptable and desirable" result would be a white/black ratio of 86%/14% in senior high schools, 80%/20% in junior high schools, and 79%/21% in elementary schools.

The July 1971 Order, which ratified Appellants' proposed desegregation plan, dealt primarily with student assignments in grades one through twelve. For elementary schools, the plan clustered each predominately black school with two to five predominantly white schools. The white schools would be used for grades one through five and would be integrated with black children from "satellite zones"[5] who had previously attended the black school in the cluster. The black school in each cluster would be used as a sixth-grade

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[5]A satellite zone is an area not contiguous with the main attendance zone for the school.

center and would be integrated with white children who had previously attended the white schools in the cluster.

For junior high schools, each black school would be clustered with one to three white schools. The black schools would be used for seventh grade, and the white schools would be used for eighth and ninth grades. Again, the schools would be integrated with students from satellite zones. For senior high schools, the two black schools would be closed, but their facilities would be used for junior high schools. Through a series of re-zoning and satellite busing measures, the white high schools would be integrated.

With regard to faculty and staff, the district court had previously entered an order on August 25, 1970. In the July 1971 Order, the court found that no additional measures were necessary, and it directed Appellants to continue to abide by the August 25, 1970, order. With respect to transportation, facilities, and extracurricular activities, the July 1971 Order directed Appellants to comply with all previous orders. The order also mandated that all operations relating to these areas should be conducted in a non- discriminatory manner and should be regularly re-examined by Appellants.

The July 1971 Order also remarked on four other topics: (1) majority to minority transfers, (2) other transfer rules, (3) the bi-racial committee, and (4) approval of site locations. Specifically, the district court stated, "Each of these has been required by previous orders of this Court. Some of them may not be required if [Appellants'] plan is effectuated and accomplished." Nevertheless, the district court stated that it was "retaining jurisdiction ***932** and [would] require the continuation of all of these procedures to be available and used as necessary."

Attached to the July 1971 Order were two exhibits which explained the bi- racial committee, majority-to-minority transfers, and other transfer rules. The bi-racial committee was to serve as an advisory body on a number of issues and was to consist of ten members, with Appellants and Appellees each selecting five members. In some instances, the committee was to receive reports about students transferring from their assigned schools. In other instances, Appellants were barred from approving student transfers before considering a recommendation from the committee.

Concerning majority-to-minority transfers, the attached exhibits stated the following:

> Majority to minority transfer--Any student shall be permitted to transfer from a school in which his race is in the majority in order to attend the closest school to his residence in which his race is in the minority.
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> . . . .
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> The transfer forms shall be available at each public school in Hillsborough County and the County School offices.
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> . . . .
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> The transferee is to be given priority for space and thus the transfer is not to be dependent on space being available.
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> Transportation will be provided by the School Board in service or in kind to the school to which the transfer is made if that school is more than two miles from the home.

In conclusion, the July 1971 Order stated that Appellants' desegregation plan "fully complie[d] with the [district] [c]ourt's order of May 11, 1971," and that it would "result in the establishment of a unitary school system in Hillsborough County, Florida." The July 1971 Order noted, however, that Appellants had a "continuing responsibility" to ensure the plan would be effectuated. Moreover, each year following the implementation of the July 1971 Order, Appellants filed two reports per year with the district court and provided copies to Appellees. Lastly, the July 1971 Order retained jurisdiction in the district court for "such further action as may be necessary and required."

2. *1991 Consent Order*

Between 1971 and 1991, the modifications to the July 1971 Order were minor.[6] By 1991, however, Appellants had determined, based upon a comprehensive study, that the school district would benefit if middle schools (grades 6-8) were established. To accomplish this, the July 1971 Order had to be modified, because that order had relied extensively on single-grade centers (grades 6 and 7) to desegregate the school district. Thus, Appellants entered into negotiations with Appellees, and the product of those negotiations was the 1991 Consent Order.

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[6]The modifications included, *inter alia:* changes in transfer rules for children of school employees; approval of a new high school site; changes in academic transfer rules; the closure of certain schools; and the creation of magnet schools. Perhaps, the most significant modification dealt with Lee Elementary School, which by 1974 had a black population in excess of 50%. To correct this imbalance, Appellants, pursuant to the district court's order, converted Lee to a sixth-grade center and transferred the former Lee students (first through fifth graders) to seven other elementary schools.

The centerpiece of the 1991 Consent Order was the Middle School Task Force Report 3 of July 1991 (hereinafter "Task Force Report"), which the district court incorporated into the consent order.[7] The Task Force Report was presented to the school board by a 12-person committee. This committee included Mr. Henry Carley, ***933** President of the Tampa Branch of the NAACP. In addition, a legal committee, consisting of, *inter alia,* Mr. Al Davis of the NAACP, reviewed the Task Force Report, and Appellees' own desegregation expert, Dr. Leonard Stevens, was involved in shaping the Task Force Report. Furthermore, the Task Force Report included two separate position statements prepared by various African-American community groups (Howard W. Blake Alumni Group, Coalition of African American Organizations, Greater Tampa Urban League, Inc., and Beta Sigma Zeta Chapter of Zeta Phi Beta Sorority). In sum, as the 1991 Consent Order explained, the Task Force Report was the result of "extensive discussions" between Appellants and Appellees, and the discussions were designed to "to ensure . . . that plans for the implementation of the [Task Force Report] were formulated in a manner that addressed the interests and concerns of [Appellees]."

The Task Force Report proposed substantial changes to the structure of the school system. Under the July 1971 Order, the school system generally had consisted of five tiers: elementary schools (grades K-5), sixth-grade centers, seventh-grade centers, junior high schools (grades 8-9), and high schools (grades 10-12). In contrast, the Task Force Report called for a three-tier school system: elementary schools (grades K-5); middle schools (grades 6-8); and high schools (grades 9-12).

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[7]The parties and the district court use interchangeably the terms "Task Force Report" and "Middle School Plan." For the sake of simplicity, we use solely the term Task Force Report.

This new structure would be achieved through a so-called "cluster model," under which 17 clusters would be formed. For each cluster, the high school would serve as the "basic unit" and its students would be drawn from "feeder" middle and elementary schools. The Task Force Report estimated that it would take five to seven years to implement the cluster model.

The cluster model proposed by Task Force Report was undoubtedly the most substantial change to the structure of the school system since the July 1971 Order. The objective of July 1971 Order had been to desegregate the school system. By contrast, one of the primary objectives of the Task Force Report was "to *maintain* a desegregated school system." (emphasis added). In an apparent attempt to meet this objective, the 1991 Consent Order directed Appellants "to minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment [race] ratios." Moreover, the 1991 Consent Order assumed that intervening demographic changes might necessitate future modifications in student assignments in order to maintain a desegregated school district.[8]

To further the goal of maintaining desired race ratios, the Task Force Report attempted to project the race ratios at each school after the cluster plan's implementation. In summary, the Task Force Report predicted:

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[8]This assumption was wrong as a matter of law. External factors which are not the result of segregation and are beyond a school board's control should not be part of the remedial calculus when shaping a federal desegregation decree. *See Missouri v. Jenkins*, 515 U.S. 70, 102, 115 S. Ct. 2038, 2055-56, 132 L. Ed. 2d 63 (1995) (citing *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434, 96 S. Ct. 2697, 2703-04, 49 L. Ed. 2d 599 (1976)); *infra* Part II.B.1.

> The number of schools reflecting a ten or higher percent race ratio variance [from the recommended ratio of 20/80%] will increase from 36 to 46. The plan also increases the number of schools from 56 to 72 that will have an almost perfectly balanced race ratio with a student variance of five percent or less from the recommended ratio of 20/80% ratio.

Appendix 1 of the Task Force Report provided more detail as to the projected racial balance at each school. Fourteen schools were projected to have a 40% or greater black population,[9] and an additional four ***934** schools were projected to have a 39% black population.[10] These projections, as part of the Task Force Report, were incorporated into the 1991 Consent Order--a consent decree to which Appellees were parties.

Along with projecting race ratios, the Task Force Report instituted a variety of programs designed to maintain a desegregated school system. For example, the report implemented magnet programs,[11] which were designed in part "to reduce minority isolation" and "to promote desegregation in

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[9]The 14 schools, with their projected race ratios, were as follows: Lomax (94%), Edison (64%), Sulphur Springs (59%), Graham (58%), Oak Park (58%), Cleveland (50%), Franklin (47%), Sligh (46%), Lockhart (45%), Palm River (41%), West Tampa (41%), Shaw (41%), B.T. Washington (40%), Witter (40%).

[10]The four schools were Foster, Bing, Dowdell, and Just.

[11]The magnet programs were intended to supplement a traditional curriculum with a focus on special "themes", such as computers and technology or visual and performing arts.

schools."[12] The report also suggested a multi-cultural curriculum for students in all grades and instructional sessions to enable staff to deal with diverse populations.

One omission in the Task Force Report, however, is particularly noteworthy in light of subsequent events: majority-to-minority transfers. Although they had been discussed briefly in the July 1971 Order, majority-to-minority transfers were not mentioned once in the 37-page Task Force Report, nor in the 8 attached appendices, nor in the 1991 Consent Order. Dr. Stevens--Appellees' desegregation expert who helped shape the Task Force Report--admitted at the 1996 evidentiary hearing that majority-to-minority transfers would have been insignificant in alleviating the racial imbalances in the school district.

3. *Factual Findings*

The magistrate judge, in her 1997 report and recommendation, structured her factual findings around the six Green factors,[13] plus a seventh factor, quality of education, which has been used by some courts to evaluate a school district's unitary status. *See, e.g., Mills v. Freeman*, 942 F. Supp. 1449, 1460 (N.D. Ga.1996), *aff'd*, 118 F.3d 727 (11th Cir.1997). In addition, the magistrate judge made factual findings regarding Appellants' good-faith compliance with past desegregation decrees, as required by *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237, 250, 111 S. Ct. 630,

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[12]In addition, the "racial composition targets for magnet school populations [was] not [to] exceed 40% black."

[13]Those six factors are student assignments, faculty, staff, transportation, extracurricular activities, and facilities and resource allocation. *See Green*, 391 U.S. at 435, 88 S. Ct. at 1693.

638, 112 L. Ed. 2d 715 (1991), and its progeny. Based on all of these findings, the magistrate judge recommended the school district be declared unitary in all respects and that federal judicial supervision of the school district be terminated.

The district judge found that the magistrate judge's report and recommendation was "comprehensive" and "agree[d] with a majority of the [m]agistrate [j]udge's analysis." *Manning*, 24 F. Supp. 2d at 1287. For six of the seven factors (faculty, staff, transportation, extracurricular activities, facilities and resource allocation, and quality of education), the district judge adopted most, if not all, of the magistrate judge's findings.[14] *See id.* at 1316-34. In their brief to this Court, Appellees do not contest the findings related to these six factors, and thus further elaboration is unnecessary except to emphasize that the findings support a declaration of unitary status.

With regard to the remaining *Green* factor (student assignments), the district judge expressed some disagreement with ***935** the magistrate judge. The district judge also differed with the magistrate judge's finding on Appellants' good-faith compliance. As we discuss in Part II, the district judge used an incorrect legal standard. As a result, the district judge's legal conclusion, though based mostly upon the magistrate judge's factual findings, was erroneous. To help illuminate our discussion in Part II, we narrate below the magistrate judge's factual findings related to student assignments and Appellants'

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[14]Regarding these six factors, the district judge's order is less than clear. After a thorough review, however, we are convinced that the district judge overruled most, and possibly all, of Appellees' objections to the magistrate judge's report and recommendation. The objections sustained by the district judge, if any, are inconsequential to our ultimate holding in this case.

good faith, and we highlight, when necessary, particular findings adopted by the district judge. We also note those few areas where the district judge rejected the factual findings of the magistrate judge.

a. *Student Assignments*

As of the 1995-96 school year, the Hillsborough County school district consisted of approximately 120,000 students, 108 elementary schools, 27 junior high schools, and 15 senior high schools. Relying on a standard proposed by Appellees' and Appellants' experts, the magistrate judge designated any school with a black/white ratio varying plus or minus 20 points from a 20/80 ratio as being "racially identifiable" or "racially imbalanced."[15] It was undisputed that, by the 1971-72 school year, all schools were desegregated. Furthermore, the evidence showed that, at the time of the 1996 evidentiary hearing, approximately 90% of the schools were not racially identifiable. Appellees, however, identified 17 schools as racially identifiable and made these schools the focus of the 1996 evidentiary hearing.[16] Ironically, of these 17 schools, 9 were

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[15]Since the parties agree on what constitutes a racially identifiable school, we shall accept their definition for purposes of this case and this case only. We pass no judgment on the correctness of this definition.

[16]Both the district judge and the magistrate judge referred to 16 schools. A review of the Joint Pre-Evidentiary Hearing Statement and the report by Appellees' expert reveals that Appellees challenged the racial identifiability of 17 schools. Both the district judge and the magistrate judge omitted Mort Elementary from their findings. This oversight, however, is of no significance. The following are the percentages of black students at each of these 17 challenged schools during the 1972-73 and 1995-96 school years:

among the 14 schools that the Task Force Report projected would have a 40% or greater black population, and two were among the four schools that the Task Force Report projected would have a 39% black population.[17] Immediately after the July 1971 Order was implemented, all of these schools became ***936** racially balanced.[18]

The critical factual question at the evidentiary hearing was whether the racial imbalances at the 17 schools were caused by Appellants' past *de jure* segregation (or other

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School	Percentage of Black Students, 1972-73	Percentage of Black Students, 1995-96
Robles	24%	91%
Edison	36%	77%
Sulphur Springs	19%	74%
Oak Park	23%	69%
Graham	35%	67%
Foster	21%	61%
Cleveland	26%	58%
Shaw	15%	57%
Witter	18%	54%
Cahoon	21%	53%
Clair Mel	18%	49%
West Tampa	14%	47%
DeSoto	35%	43%
Mort	N/A	43%
Van Buren	17%	53%
Sligh	20%	50%
Dowdell	14%	48%

[17]*Compare supra* notes 9, 10 *with supra* note 16.

[18]One school, Mort, was not listed in the 1971 report submitted by Appellants and thus presumably did not exist at that time.

discriminatory conduct), or whether, instead, the racial imbalances were caused by nondiscriminatory factors and circumstances. In a joint statement submitted prior to the evidentiary hearing, Appellants contended that demographic shifts had caused the schools to become racially identifiable. In the same joint statement, Appellees did not directly rebut Appellants' contention, but instead argued that "[d]emographic change *alone* does not account for the racial identifiability in the Hillsborough County school system." (emphasis added).

To resolve their factual dispute, the parties presented considerable evidence to the magistrate judge, including, *inter alia,* reports on attendance boundaries, demographic reports, and expert testimony. We need not repeat all this evidence here, as it is fully set forth in the opinion of the district court. *See Manning*, 24 F. Supp. 2d at 1290-1312. Instead, we compare the findings of the magistrate judge to those of the district judge.

The magistrate judge, in her report and recommendation, recounted the expert testimony of Dr. David Armor, one of Appellants' experts--testimony that the magistrate judge personally observed. Dr. Armor explained that he reviewed the extensive demographic data contained in a report by Dr. W.A.V. Clark, another of Appellants' experts. Based on this evidence, Dr. Armor opined on the witness stand that "none of the schools that were currently imbalanced . . . were caused by [Appellants'] action[s,]" but rather such imbalances "were caused by demographics." The magistrate judge also reviewed the testimony of Dr. Fred Shelley, Appellees' demographic expert--once again, testimony that the magistrate judge personally observed. Dr. Shelley did not conduct his own demographic study, but rather relied on the data supplied by Dr. Clark (Appellants' expert). Dr. Shelley opined "that it is perhaps difficult to conclude that [the] increase in racial imbalance is attributable solely to the processes of natural

demographic change." In the end, the magistrate judge agreed with Dr. Armor and found that demographic change is the "most likely explanation" for the racial imbalances. The magistrate judge faulted Dr. Shelley for not providing an alternative explanation for the racial imbalances.[19]

The district judge, though not observing any of the testimony, agreed for the most part with the findings of the magistrate judge. In conformity with Dr. Armor's opinion (and the magistrate judge's finding), the district judge found that "[t]here [was] no indication that the racial identity of the schools in Hillsborough County has been deliberately caused by segregative policies or practices by [Appellants]" and that "based on the totality of the evidence, a shift in demographics [was] a substantial cause of the racial identifiability in Hillsborough ***937** County's schools." *Manning*, 24 F. Supp.

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[19]In his report, Dr. Shelley did not attempt to link the present racial imbalances with past *de jure* segregation, but rather merely tried to prove that demographics *alone* did not cause the upsurge in racially identifiable schools. At the evidentiary hearing, when asked how his report differed from Dr. Clark's report, Dr. Shelley responded:

> My reaction to the report was that, while I thought the demographic analysis was very good, what I felt was missing in the report was how to reason from the analysis of the demographic change that was undertaken to a conclusion that demographic change was the *sole* cause of the observed racial imbalance in the public schools in Hillsborough County.

Tr. of Evidentiary Hearing on October 24, 1996, Vol. 4, at 66 (emphasis added). Dr. Shelley expressed doubts that "one can conclude *without ambiguity* that [the racial] imbalance is caused *only* by natural demographic changes." *Id.* at 66-67 (emphasis added).

2d at 1303, 1310. The district judge likewise was unable to cite, in either of her two orders, any independent demographic evidence put forward by Appellees or an alternative explanation proffered by Dr. Shelley as to the cause of the racial imbalances.

The district judge seemed to have adopted *in toto* Appellants' theory of the case (and the magistrate judge's finding). As the district judge stated time and time again, a shift in demographics was a substantial or significant cause of the racial imbalances, and Appellants did not deliberately cause the racial imbalances. *See id.* at 1293 (stating "that the racial imbalances in the schools [were] not the result of a deliberate attempt by [Appellants] to affect or alter demographic patterns to affect the racial composition of the schools"); *id.* at 1311 (finding "the evidence presented by the parties establishes that a shift in demographics played a significant role in the racial compositions of the schools" and that Appellants had "not 'affirmatively' exacerbated racial imbalances"); *Manning*, 28 F. Supp. 2d at 1356 (stating that "demographics have played a significant role in Hillsborough County"). The district judge even agreed that "[i]t [was] probable that" the 17 challenged "schools would have become racially imbalanced regardless of [Appellants'] efforts." *Manning*, 24 F. Supp. 2d at 1303. Even Appellees' own expert, according to the district judge, "agreed that demographics have played a significant role in Hillsborough County." *Id.* Despite all of the evidence showing that demographics, and not *de jure* segregation, caused the racial imbalances, the district judge ultimately declined to find the school district unitary as to student assignments. The district judge declined to so find because she could not conclude that demographics were the *sole* cause of the racial imbalances. *See id.* at 1302. In the district judge's view, therefore, the legal presumption remained that any racial imbalances were the result of the prior *de jure* segregation. *See Manning*, 28 F. Supp. 2d at 1357.

Finally, we note that the district judge's findings were inconsistent and difficult to follow. For example, the district judge was concerned by Dr. Clark's data, especially with regard to its reliability.[20] *See Manning*, 24 F. Supp. 2d at 1298-1300. Nevertheless, the district judge never stated that the data--which both sides relied upon--was so unreliable so as to undermine her finding that "a shift in demographics [was] a substantial cause of the racial identifiability in Hillsborough County's schools." *Id.* at 1303. Additionally, the district judge remarked that she was "not convinced that a shift in demographics explain[ed] the racial imbalance in the Hillsborough County school system." *Manning*, 28 F. Supp. 2d at 1356; *see also* Manning, 24 F. Supp. 2d at 1293. Yet, in the very same sentence, the district judge also stated that "demographics have played a significant role in Hillsborough County." *Manning*, 28 F. Supp. 2d at 1356. In spite of these inconsistencies, we are convinced that

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[20]In particular, the district judge noted the following:

> [Appellants'] statistics encompass a larger segment of the population than is useful to explain the deviations in the racial compositions of the unbalanced schools. Specifically, [Appellants] rely on Dr. Clark's use of school-aged children from ages 0-17 to explain enrollment ratios at the elementary schools; however, almost one-half of the children included in this group would not, in fact, be attending an elementary school. Moreover, while a few blocks in an attendance zone may reflect black school-age populations as high as 95%, those few blocks only represent a small proportion of the entire attendance zone. Finally, Dr. Clark's analysis does not address [Appellants'] initial decisions to draw attendance zones, decisions not to act when it was apparent that those zones were inappropriate, or other School Board decisions, such as, location of new schools, or implementation (or lack thereof) of desegregation tools.

Manning, 24 F. Supp. 2d at 1298.

the district judge agreed with the magistrate judge and found that shifting demographics was a substantial ***938** cause of the racial imbalances in Appellants' student assignments and that Appellants did not deliberately cause the racial imbalances.

b. *Good-Faith Compliance*

The magistrate judge concluded that Appellants had complied in good faith with past federal desegregation decrees, as required by *Dowell* and its progeny. 498 U.S. at 249-50, 111 S. Ct. at 638. The magistrate judge's conclusion was based largely on the testimony given during the 7-day evidentiary hearing by a variety of witnesses, including *inter alia:* Dr. Walter Sickles, the school superintendent from 1989 to 1996; Dr. Earl Lennard, the school superintendent as of 1996; five members of the school board; Doris Reddick, the chair of the school board; Andrew Manning, the lead plaintiff in the case since its inception; and Joanna Tokley, the president and CEO of the Urban League.

Dr. Sickles, who had been an employee of the school board since 1969, testified that he believed the school district was unitary in the early 1990's. Dr. Sickles did not seek a declaration of unitary status at that time because he believed Appellees would have opposed and impeded his effort to establish middle schools, which was his top priority. Instead, Dr. Sickles sought Appellees' cooperation in establishing middle schools via the Task Force Report and the 1991 Consent Order. Dr. Lennard, an employee of the school board since 1964, testified that he felt a "moral and legal obligation on the school system to continue a desegregated school system." Five school board members "expressed no misgivings about . . . the intent and ability of the School Board to continue a desegregated school system while receiving input from all members of the community."

Some witnesses "voice[d] concern about what might happen in the future if [c]ourt supervision ended." For instance, Ms. Reddick, the chair of the school board, testified against a finding of unitary status. Nevertheless, when asked by Appellees' counsel what would happen if the school district were found unitary, Ms. Reddick asserted, "[W]e're going to guarantee that students will receive equal education."

The magistrate judge found that for more than 25 years Appellants had complied with the court's orders to desegregate and that not once had Appellants been found in violation of any court order. In addition, the magistrate judge noted that Appellants had "regularly conferred [with Appellees] . . . to ensure that the school system was moving forwards, not backwards, toward compliance with the [c]ourt's orders." Accordingly, "the long history of compliance with the [c]ourt's orders" outweighed the "opinions and the anecdotal evidence offered by [Appellees]." In sum, the magistrate judge concluded, "The testimony of . . . most School Board members, as well as the current superintendent and those responsible for various facets of school operation[,] demonstrates that [Appellants] have accepted the principle of racial equality and will not revert back to a dual school system."

The district judge, however, did not adopt this finding of good faith. Since the district judge did not observe any of the testimony from the evidentiary hearing, naturally she could not evaluate the credibility of the witnesses. Instead, the district judge's finding of bad faith centered upon two interrelated areas of concern: Appellants' "apathy" and the lack of a majority-to-minority (MTM) transfer program.[21] *See Manning*, 24 F. Supp.

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[21]The district judge and the magistrate judge also extensively discussed some *ex parte* communications between a previous presiding judge and school officials. During the evidentiary hearing,

2d at 1293, 1312-14.

***939** With regard to Appellants' "apathy," the district judge faulted Appellants for not "utiliz[ing] all available techniques [to desegregate] to the maximum extent practicable" and for not demonstrating "that they [were] willing to aggressively desegregate the school district to the maximum

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Dr. John Heur, a retired school board official who had been responsible for implementing the July 1971 Order, testified that such communications occurred between 1972 and 1974. The magistrate judge found that "[t]hese *ex parte* conversations, while unfortunate, were not initiated by [Appellants] and do not demonstrate a lack of good faith." The district judge agreed, finding that, "standing alone, the *ex parte* communications [did] not evidence bad faith." *Manning*, 24 F. Supp. 2d at 1315. Additionally, Part II of the October 26, 1998, opinion is titled "Good- Faith" and discusses Appellants' magnet programs. *See Id.* at 1314-15. This portion of the opinion is very confusing. It lists the arguments advanced by Appellees regarding magnet schools, but the opinion never states whether it is adopting those arguments. In the opinion of December 4, 1998, the district judge faults Appellants for their failure to develop magnet schools and programs, except for one program at Tampa Bay Technical High School. *See Manning*, 28 F. Supp. 2d at 1359. But neither opinion ever explains how Appellants' actions with respect to magnet programs demonstrated bad faith.

We therefore conclude that the district judge did not base her finding of bad faith upon Appellants' magnet programs. Even if the district judge did, in fact, base her finding of bad faith on Appellants' magnet programs, such a finding would be clearly erroneous. In 1990, Appellants moved to designate a magnet school, but Appellees opposed the motion. In successfully opposing the motion, Appellees argued that "[t]he basic structure of desegregation in [Appellants'] school system has remained constant and effective since 1971," and that a magnet program would "introduce more uncertainty about whether schools will remain desegregated."

extent practicable." *Id.* at 1312, 1335. Additionally, the district judge spoke of missed opportunities and a failure to take "affirmative steps . . . to be released from the [c]ourt's supervision." *Id.* at 1312; *accord Manning*, 28 F. Supp. 2d at 1359 (citing *Lockett v. Bd. of Educ. of Muscogee Sch. Dist.*, 92 F.3d 1092, 1099 (11th Cir.1996) (*Lockett I*)). Nevertheless, after a request by Appellants to clarify exactly what steps should be taken to desegregate to the maximum extent practicable, *see id.* at 1355, the district judge declined to give any specifics.

Related to the issue of apathy is the inaction demonstrated by Appellants in their MTM program. As previously noted, the July 1971 Order directed the establishment of an MTM program. *See supra* Part I.B.1. Under this program, a student who attended a school where his race was the majority would be permitted to transfer to a school where his race was the minority. At the evidentiary hearing, Dr. John Miliziano, who was Appellants' "in-house desegregation expert," expressed ignorance about the requirement to implement an MTM program:

> I dealt with the Biracial Committee for many years, and no member of the committee ever brought that up. And to tell you the truth, I thought it was one of those things that was considered by the court and it was never meant to apply. It wasn't until recently that I, a person who has spent many, many years in dealing with the court order, maybe it's stupidity on my part, but I didn't even know that this hidden clause--this clause, not hidden, but this clause in the [July 1971 Order] meant really anything.

Manning, 24 F. Supp. 2d at 1313. The evidence also showed that, from 1977 to 1996, no student had ever applied for an MTM transfer, and Appellants had not made any effort to

publicize or market the MTM program. *See id.* at 1314; *Manning*, 28 F. Supp. 2d at 1359.

While faulting Appellants on the MTM program, the district judge acknowledged that the July 1971 Order "did not specifically direct [Appellants] to market the [MTM] program." *Manning*, 24 F. Supp. 2d at 1314. Furthermore, the district judge noted (and did not dispute) that no member of the Bi-Racial Committee and no representative of Appellees had complained, prior to the mid- 1990's, about the non-availability of an MTM program. *See id.* at 1313 (quoting testimony of Dr. Miliziano). The district judge also found that when Appellees did raise the lack of an effective MTM program, Appellants announced ***940** the program "to the [school] district as a whole and . . . took action to publish information about the program." *Id.* at 1312.

Although the district judge stated that an MTM program is an "indispensable remedy" and a "useful part of every desegregation plan,"[22] *id.* at 1314, the district judge did not explain why this *particular* MTM program was needed to desegregate the Hillsborough County school district. In fact, as previously mentioned, Dr. Stevens--Appellees' expert who was involved in the negotiations that led to the 1991 Consent Order--conceded that an MTM program would not significantly impact the race ratios at the schools Appellees were challenging as racially imbalanced. Furthermore, the Task Force Report and the 1991 Consent Order (both of which were approved by the

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[22]The district judge lifted this language from the Supreme Court's opinion in *Swann*, 402 U.S. at 26-27, 91 S. Ct. at 1281. In the very same opinion, however, the Supreme Court warned that "[n]o *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved [in desegregating schools]." *Id.* at 26, 91 S. Ct. at 1281.

district judge) failed to even mention the MTM program. Lastly, notwithstanding the criticism of the MTM program, the district judge spoke favorably of Appellants' overall desegregation efforts. *See, e.g., id.* at 1287 (stating that "[u]ndoubtedly, [Appellants'] desegregation efforts demonstrate significant success"); *id.* at 1311 (stating Appellants "deserve acknowledgment for their desegregation efforts thus far"); *id.* at 1312 (noting Appellants "have been relatively successful in implementing desegregation techniques"); *id.* at 1325 (finding Appellants had acted in good faith with respect to faculty desegregation and commending Appellants for taking recommendations from the Minority Recruitment Task Force).

II. DISCUSSION

A. *Standard of Review*

Where the relief sought in the district court is the dissolution of an injunction, the order of the district court is subject to a mixed standard of review.[23] We review for abuse of discretion the failure to dissolve an injunction as required by law. *See Wilson v. Minor*, 220 F.3d 1297, 1301 (11th Cir.2000). The district court's application of law is subject to

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[23]We raised *sua sponte* whether appellate jurisdiction existed in this case and requested briefs from the parties. Since this is an appeal of an interlocutory order of the district court refusing to dissolve an injunction, we do possess jurisdiction. *See* 28 U.S.C. § 1292(a)(1). We also raised *sua sponte* whether the notice of appeal was timely filed. Appellants timely filed in the district court a motion to alter or amend judgment under Fed. R. Civ. P. 59(e). As such, Appellants could file their appeal until 30 days after the district court ruled on the Rule 59(e) motion. *See* Fed. R. App. P. 4(a)(4)(iv). Since the Appellants complied with this time limit, we conclude Appellants timely filed their notice of appeal. Thus, we may hear this appeal.

de novo review, while its findings of fact are subject to a clearly erroneous standard of review under Fed. R. Civ. P. 52(a). *See Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir.1997) (quoting *SunAmerica Corp. v. Sun Life Assurance Co. of Can.*, 77 F.3d 1325, 1333 (11th Cir.1996)). A declaration of a school system's unitary status is a finding of fact and thus falls under the clearly erroneous standard of Rule 52(a). *See Lockett v. Bd. of Educ. of Muscogee County Sch. Dist.*, 111 F.3d 839, 841-42 (11th Cir.1997) (*Lockett II*); *Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 883 F.2d 945, 952 n. 3 (11th Cir.1989). Under this standard of review, "[w]here there are two permissible views of the evidence, the [district court]'s choice between them cannot be clearly erroneous." *Lockett II*, 111 F.3d at 842; *accord Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985). But where a district court applies an incorrect legal standard which "taints" or "infects" its findings of facts, such findings "lose the insulation of ***941** [Rule] 52(a) and judgment based thereon cannot stand." *Corley v. Jackson Police Dept.*, 566 F.2d 994, 1001 (5th Cir.1978) (internal quotations and citation omitted);[24] *accord Bigge v. Albertsons, Inc.*, 894 F.2d 1497, 1502- 03 (11th Cir.1990); *Harris v. Birmingham Bd. of Educ.*, 712 F.2d 1377, 1381 (11th Cir.1983); *Lincoln v. Bd. of Regents of Univ. Sys. of Ga.*, 697 F.2d 928, 938-39 (11th Cir.1983); *see also Solomon v. Liberty County Comm'rs*, 221 F.3d 1218, 1227 (11th Cir.2000) (*en banc*) (stating "Rule 52(a) does not inhibit an appellate court's power to correct errors of law").

B. *Analysis*

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[24]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

1. *General Principles*

Before analyzing the case before us, it is important to recall some general principles. In *Brown I*, the Supreme Court held that *de jure* racial segregation practiced by school districts violates the Fourteenth Amendment. *See Lockett II*, 111 F.3d at 842 (citing *Brown I*, 347 U.S. at 495, 74 S. Ct. at 692). To remedy the illegal conduct, the Supreme Court ordered federal district courts to supervise local officials in desegregating school systems. *See id.* (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 301, 75 S. Ct. 753, 757, 99 L.Ed. 1083 (1955) (*Brown II*)). Federal judicial supervision of local officials, however, was intended to be a temporary measure. *See id.* (citing *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247, 111 S. Ct. 630, 637, 112 L. Ed. 2d 715 (1991)).

A desegregation order is remedial in nature, for it is the means by which victims of discriminatory conduct are restored to the position they would have occupied in the absence of such conduct. *See Missouri v. Jenkins*, 515 U.S. 70, 87, 115 S. Ct. 2038, 2048, 132 L. Ed. 2d 63 (1995) (citing *Milliken v. Bradley*, 418 U.S. 717, 746-47, 94 S. Ct. 3112, 3128, 41 L. Ed. 2d 1069 (1974)). The purpose of federal supervision is not to maintain a desired racial mix at a school. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 434-37, 96 S. Ct. 2697, 2704-05, 49 L. Ed. 2d 599 (1976); *see also Freeman v. Pitts*, 503 U.S. 467, 494, 112 S. Ct. 1430, 1447, 118 L. Ed. 2d 108 (1992) (noting that "[r]acial balance is not to be achieved for its own sake"). Rather, a federal court may insist upon a racially balanced school only in those situations where a constitutional violation has caused the school to become racially imbalanced. *See id.* at 494, 112 S. Ct. at 1447. As the Supreme Court instructed 30 years ago, "[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further

intervention by a district court should not be necessary." *Swann*, 402 U.S. at 31-32, 91 S. Ct. at 1283-83. Put simply, a school board has no obligation to remedy racial imbalances caused by external factors, such as demographic shifts, which are not the result of segregation and are beyond the board's control. *See Jenkins*, 515 U.S. at 102, 115 S. Ct. at 2055-56 (citing *Spangler*, 427 U.S. at 434, 96 S. Ct. at 2703-04; *Swann*, 402 U.S. at 22, 91 S. Ct. at 1279).

The ultimate objective of any desegregation order is the "restoration of state and local authorities to the control of a school system that is operating in compliance with the Constitution."[25] ***942** *Id.* at 89, 115 S. Ct. at 2049 (internal quotations and citation omitted). To guide district courts in assessing when it is appropriate to restore local control, the

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[25]Local control is complementary, not contradictory, to the goal of eradicating illegal discrimination from our nation's schools. The Supreme Court has spoken to this principle:

> Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course. . . . [I]t must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of *de jure* segregation have been eliminated. It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility.

Freeman, 503 U.S. at 490, 112 S. Ct. at 1445.

concept of a "unitary" school system has evolved in federal jurisprudence. *See generally Freeman*, 503 U.S. at 485-92, 112 S. Ct. at 1443-46 (1992). In evaluating whether a school system is "unitary," a district court must carefully assess the facts and utilize its sound discretion to determine (1) whether local authorities have eliminated the vestiges of past discrimination to the extent practicable, and (2) whether local authorities have in good faith fully and satisfactorily complied with, and shown a commitment to, the desegregation plan. *See Lockett II*, 111 F.3d at 842 (quoting *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1425 (11th Cir.1992) (citing *Dowell*, 498 U.S. at 249-50, 111 S. Ct. at 638)). For a district court to determine whether the vestiges of discrimination have been eliminated to the extent practicable, it must examine the six facets of school operation, the so-called *Green* factors: student assignments, faculty assignments, staff assignments, transportation, extra-curricular activities, and facilities. *See id.* (citing *Dowell*, 498 U.S. at 245, 111 S. Ct. at 636 (quoting *Green*, 391 U.S. at 435, 88 S. Ct. at 1693)). Using its discretion, a court may also consider other facets. *See id.* (citing *Freeman*, 503 U.S. at 492, 112 S. Ct. at 1446).

It is not uncommon for plaintiffs in school desegregation cases to allege, as Appellees did here, that racial imbalances in student assignments, are a "vestige of discrimination." Until unitary status is attained, the defendant school board has the burden of showing that any racial imbalance in the school system is not traceable, in a proximate way, to the prior *de jure* segregation. *See Freeman*, 503 U.S. at 494, 112 S. Ct. at 1447. Stated differently, once a plaintiff shows *de jure* segregation (as Appellees did here in 1962, *see supra* Part I.A), a presumption arises that all racial imbalances in a school district are the result of the *de jure* segregation. *See Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 208, 93 S. Ct. 2686, 2697, 37 L. Ed. 2d 548 (1973). To rebut this presumption, "a school board must prove that the imbalances are not the result of present or

past discrimination on its part." *Lockett II*, 111 F.3d at 843 (citing *Swann*, 402 U.S. at 25, 91 S. Ct. at 1281); *accord Keyes*, 413 U.S. at 211, 93 S. Ct. at 2699.

2. *District Court's Reliance on* Lockett I

a. *Wrong Legal Standard*

With the foregoing principles and standards in mind, we turn to the case before us. Appellants argue, *inter alia*,[26] that the district court committed reversible error by relying upon our opinion in ***943** *Lockett v. Board of Education of Muscogee County*, 92 F.3d 1092 (11th Cir.1996) (*Lockett I*).[27] In *Lockett I*, a panel of this Court reversed a district court's finding of

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[26]We need not address every argument advanced by Appellants with which we agree. We pause, however, to highlight Appellants' contention that the district court must provide them with a "precise statement" of their obligations under a consent decree. *See, e.g., Jenkins*, 515 U.S. at 101, 115 S. Ct. at 2055. The district judge avoided this requirement and held that she would not "tell [Appellants] which specific means to employ" for achieving unitary status. *Manning*, 28 F. Supp. 2d at 1360; *see also id.* at 1355 (refusing to describe "specific action" for Appellants to take). Even if we were to hold that Appellants' school district was not unitary, we would nonetheless remand this case with instructions that the district court provide specific guidance on what steps Appellants must take to achieve unitary status. But since we conclude the school district is unitary, *see infra* Part III, there is no need for the district judge to issue a statement, precise or otherwise, on Appellants' obligations.

[27]The district judge was aware that *Lockett I* had been superseded by *Lockett II*, but she justified her reliance on *Lockett I* upon the belief that "*Lockett I* reiterated established principles of law." *Manning*, 24 F. Supp. 2d at 1311. District judges in this circuit, however, are required to adhere to the decisions of this Court and the Supreme Court. *See Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co.*, 240 F.3d 956, 965-66 n. 14 (11th Cir.2001).

unitary status and ordered the district court to "retain jurisdiction . . . to monitor the progress of the school district's desegregation efforts" until the school district could show that it "ha[d] desegregated its schools to the *maximum* extent practicable." *Id.* at 1101 (emphasis added). *Lockett I* was subsequently vacated by the same panel. *See Lockett II*, 111 F.3d at 840-45.

The district judge, in relying on *Lockett I*, applied the wrong legal standard. The law does not require, as stated in *Lockett I*, that a school board eliminate the vestiges of past discrimination "to the *maximum* extent practicable." 92 F.3d at 1101 (emphasis added). Rather, the law merely requires that the vestiges of past discrimination be eliminated "to the *extent practicable*." *Lockett II*, 111 F.3d at 842 (emphasis added); *accord Jenkins*, 515 U.S. at 90, 115 S. Ct. at 2050;[28] *Freeman*, 503 U.S. at 492, 112 S. Ct. at 1446; *Dowell*, 498 U.S. at 250, 111 S. Ct. at 638; *United States v. Georgia*, 171 F.3d 1344, 1347 (11th Cir.1999); *Lee*, 963 F.2d at 1425. The district judge incorrectly referred to the "maximum extent practicable (or possible)" standard at least 12 times in her opinion of October 24, 1998, and four times in her order of December 4, 1998. *See Manning*, 24 F. Supp. 2d at 1287, 1289, 1290, 1292, 1293, 1301, 1312, 1326, 1334, 1335; *Manning*, 28 F. Supp. 2d at 1356, 1359, 1360.

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[28]The district court in *Jenkins* stated that its goal was to integrate the school district to the "maximum extent practicable" and to the "maximum potential." 515 U.S. at 81, 101, 115 S. Ct. at 2045, 2055. The Supreme Court *expressly rejected* this test and held that the proper test was whether the deficiencies "attributable to prior *de jure* segregation had been remedied to the extent practicable." *Id.* at 101, 115 S. Ct. at 2055.

Accordingly, the critical issue is whether the district judge's repeated use of the wrong legal standard sufficiently tainted or infected the findings of fact so as to strip those findings of the insulation normally accorded under Rule 52(a). *See supra* Part II.A; *Corley*, 566 F.2d at 1001. We would not permit an inadvertent use of language by a district court to constitute reversible error. Here, however, we are persuaded that the district judge's mistake is more than mere inadvertence.[29] As we discuss immediately below, the district judge's findings on student assignments and good faith were tainted (and thus stripped of Rule 52(a) protection) because the district judge held Appellants to a higher standard than the law requires.

b. *Application of Wrong Legal Standard to Finding on Student Assignments*

In *Lockett,* the critical issue was, as it is here, whether the racial imbalances in student assignments precluded a finding of unitary status. *See Lockett II*, 111 F.3d at 842, 843. *Lockett II* held that, for a school board to rebut the presumption of *de jure* segregation, the school board had to prove "the [racial] imbalances [were] not the result of present or past discrimination on its part." *Id.* at 843; *see also supra* Part II.B.1. The district court in ***944** *Lockett II* found the school board rebutted the presumption by presenting expert demographic evidence showing the imbalances to be the result

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[29]The phrase "to the extent practicable" is not meaningless surplusage. As the Third Circuit has noted, "[T]he phrase 'to the extent practicable' implies a reasonable limit on the duration of [the] federal supervision" because "extend[ing] federal court supervision indefinitely is neither practicable, desirable, nor proper." *Coalition To Save Our Children v. State Bd. of Educ. of Del.*, 90 F.3d 752, 760 (3d Cir.1996).

of voluntary housing patterns and demographic change. *See id.* The school board's demographic evidence was not contradicted by plaintiffs' experts. *See id.* The *Lockett II* majority affirmed the district court's finding as not being clearly erroneous. *See id.* at 844.

By contrast, *Lockett I* staked out a position on the law under which school boards would have been held to a higher standard. Instead of affirming, the *Lockett I* panel would have remanded, so the district court could have continued supervising the school board "until such time as a reliable body of data exist[ed] to assure . . . that the school district ha[d] desegregated its schools to the *maximum* extent practicable." *Lockett I*, 92 F.3d at 1101 (emphasis added); *accord Lockett II*, 111 F.3d at 844 (Barkett, J. dissenting). Under *Lockett I*, a school board would have been required to remedy racial imbalances even when "the imbalances [were] caused by circumstances over which the school district has no control." *Lockett I*, 92 F.3d at 1099 (quoted in *Manning*, 24 F. Supp. 2d at 1310). Moreover, according to *Lockett I*, to be declared unitary, it is not enough for a school board to show demographic shifts as the cause of the racial imbalances, as "demographic shifts are not necessarily independent of prior unconstitutional practices."[30] *Id.* at 1099 (cited in *Manning*, 28 F. Supp. 2d at 1359).

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[30]Judge Barkett, the author of *Lockett I*, further elaborated on this view in her *Lockett II* dissent. In particular, Judge Barkett wrote that it was erroneous to "assume[ ] that as long as a school district can point to some force not directly related to a school district's overt actions which is causing or exacerbating racial imbalances, then the resulting imbalance is not traceable to past practices." *Lockett II*, 111 F.3d at 845 (Barkett, J. dissenting).

Lockett I, however, is not the law of this circuit. Rather, the law of the circuit must be distilled from *Lockett II*. We reiterate that, to overcome the presumption that racial imbalances are constitutionally violative, "a school board must prove that the imbalances are not the result of present or past discrimination on its part." *Lockett II*, 111 F.3d at 843. *Lockett II* stands for the proposition that a school board overcomes this presumption when it shows that some external force, which is not the result of segregation and is beyond the school board's control, substantially caused the racial imbalances. *See id.* (upholding declaration of unitary status when district court found demographic shifts caused racial imbalances); *see also Jenkins*, 515 U.S. at 102, 115 S. Ct. at 2055-56; *contra Lockett II*, 111 F.3d at 845 (Barkett, J. dissenting) (advocating contrary proposition). Where a defendant school board shows that demographic shifts are a substantial cause of the racial imbalances, the defendant has overcome the presumption of *de jure* segregation. *See Lockett II*, 111 F.3d at 843. Courts shall not assume that demographic shifts are a result of the past *de jure* segregation. *Contra Lockett I*, 92 F.3d at 1099 (advocating contrary proposition); *Lockett II*, 111 F.3d at 845 (Barkett, J. dissenting) (same). Such an assumption is improper because " '[i]t is simply not always the case that demographic forces causing population change bear any real and substantial relation to a *de jure* violation, and the law need not proceed on that premise'."[31] *Lockett II*, 111 F.3d at 843 (internal alterations omitted) (quoting *Freeman*, 503 U.S. at 496, 112 S. Ct. at 1448). Lastly, a plaintiff does not undermine the strength of a

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[31]In addition, "[a]s the *de jure* violation becomes more remote in time and . . . demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system." *Lockett II*, 111 F.3d at 843 (internal alterations included) (quoting *Freeman*, 503 U.S. at 496, 112 S. Ct. at 1448).

defendant's demographic evidence by merely asserting that demographics *alone* do not explain the racial***945** imbalances.[32] Rather, for a plaintiff to preserve the presumption of *de jure* segregation, the plaintiff must show that the demographic shifts are the result of the prior *de jure* segregation or some other discriminatory conduct.

If the district judge had applied *Lockett II*, rather than *Lockett I*, her findings of fact would have led her to the same conclusion as the magistrate judge with respect to student assignments. The district judge, like the magistrate judge, found that demographic shifts were a "substantial" or "significant" reason for the racial imbalances and that the racial imbalances were inevitable, irrespective of Appellants' efforts. *See supra* Part I.B.3.a; *Manning*, 24 F. Supp. 2d at 1303, 1311; *Manning*, 28 F. Supp. 2d at 1356. With this finding of fact, Appellants overcame the presumption that the racial imbalances in student assignments were the result of *de jure* segregation. To preserve the presumption, Appellees were required to show that the demographic shifts were the result of the past segregative practices or some other discriminatory conduct. Appellees made no such showing. The district judge never found that the racial imbalances at the 17 challenged schools were caused by the past *de jure* segregation or other discriminatory acts. In fact, the district judge found the exact opposite. That is, the district judge found that Appellants did not deliberately cause the racial imbalances through segregative policies or practices. *See supra* Part I.B.3.a; *Manning*, 24 F. Supp. 2d at 1310. Appellees merely persuaded the district judge that demographics *alone* did not account for the racial imbalances. *See id.* at 1302 (refusing to find that a "shift in

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[32]It is elementary that one may not rebut extensive evidence with a scintilla of evidence. *See, e.g.*, 2 *McCormick on Evidence* § 338, at 416 (John W. Strong et al. eds., 5th ed. 1999).

demography [was] the sole cause [of] the [racial] imbalance[s]" in the school system). Such a finding is insufficient to deny Appellants a declaration of unitary status.

Accordingly, by applying the correct legal standard from *Lockett II* to the district judge's findings of fact, we reach the same conclusion as the magistrate judge: Appellants have achieved unitary status with respect to student assignments.

c. *Application of Wrong Legal Standard to Finding on Good Faith*

As discussed previously, the district judge had two interrelated areas of concern which precluded, in her view, a finding of good faith: Appellants' apathy and the lack of an effective MTM program. *See supra* Part I.B.3.b. The district judge's reliance on *Lockett I* undoubtedly infected her finding with regard to Appellants' alleged apathy. The district judge, as noted above, expected Appellants to "desegregate the public schools in Hillsborough County to the maximum extent practicable." *E.g., Manning*, 24 F. Supp. 2d at 1287; *supra* Part I.B.3.b. Such an expectation was erroneous, for the law does not require a defendant school board to take every conceivable step in attempting to desegregate. *See, e.g., Freeman*, 503 U.S. at 493, 112 S. Ct. at 1447 (expressly rejecting premise that "heroic measures must be taken to ensure racial balance"). Thus, the district judge's concern about Appellants' alleged "apathy" was an error of law directly traceable to her reliance upon *Lockett I.*

Further, Appellants' lack of an effective MTM program does not necessarily amount to a finding of bad faith. For instance, in *Lockett,* the school board did not implement its MTM program until years after the desegregation decree was entered and ignored other requirements of the desegregation decree. *See Lockett II*, 111 F.3d at 844; *Lockett I*, 92 F.3d at 1100, 1101. Nonetheless, we affirmed a finding of good faith

based in part on the district court's finding that the school board had never violated a court order, ***946** had never been enjoined or sanctioned, and had consulted with African- American members of the community before modifying the student assignment plan. *See Lockett II*, 111 F.3d at 843-44; *contra Lockett I*, 92 F.3d at 1100, 1101. Likewise, in the case *sub judice*, Appellants never violated a court order, never were sanctioned, and consulted extensively with the African-American community, including Appellees, prior to implementing new student assignments under the 1991 Task Force Report. *See supra* Parts I.B.2 & I.B.3.b. Therefore, based on *Lockett II*, the district judge clearly could have found the Appellants acted in good faith, notwithstanding the lack of a viable MTM program.

Additionally, we are persuaded that, if the district judge had followed the law as set forth in *Lockett II*, she would have concluded that Appellants have acted in good faith. As we explained in *Lockett II*, in determining whether a school board has acted in good faith, a court should not dwell on isolated discrepancies, but rather should "consider whether the school board's policies form a consistent pattern of lawful conduct directed to eliminating earlier violations."[33] *Lockett II*, 111 F.3d at 843 (internal quotations omitted); *see also Freeman*, 503 U.S. at 491, 112 S. Ct. at 1446 (holding that "a court should give particular attention to the school system's record of compliance"). Repeatedly in the October 26, 1998, opinion, the

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[33]The focus is on the school board's pattern of conduct, and not isolated events, because the purpose of the good-faith finding is to ensure that a school board has accepted racial equality and will abstain from intentional discrimination in the future. *See Lockett II*, 111 F.3d at 843 (citing *Freeman*, 503 U.S. at 498, 112 S. Ct. at 1449). Focusing on isolated aberrations blurs a court's long-term vision.

district judge commended Appellants for their desegregation efforts. *See, e.g., Manning*, 24 F. Supp. 2d at 1287, 1311, 1312, 1325; *supra* Part I.B.3.b. At the end of the opinion, the district judge further commented:

> After evaluating the voluminous record in this case, the Court is convinced that [Appellants] have a short road to travel [to attain unitary status]. Essentially, [Appellants] need to demonstrate that they are willing to aggressively desegregate the school district to the maximum extent practicable.[34]

Manning, 24 F. Supp. 2d at 1335. Based on the foregoing statement, we are convinced that, if the district judge had applied the correct standard, she would have found (as the magistrate judge did) that Appellants acted in good faith, notwithstanding the absence of an effective MTM program and other possible discrepancies.

Our conclusion is buttressed by two other points. First, the MTM program, as conceded by Appellees' expert, would have been ineffective in desegregating the 17 challenged schools.[35] As such, the MTM program should have had only marginal relevance in analyzing whether Appellants' "policies form[ed] a consistent pattern of lawful conduct *directed to*

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[34]In contrast to the district judge, the magistrate judge recognized that "[a] school board's affirmative duty to desegregate does not require adoption of the most desegregative alternative available."

[35]We are by no means suggesting that a desegregation plan cannot, or should not, include an MTM program. The Supreme Court has spoken favorably of MTM programs. *See Swann*, 402 U.S. at 26-27, 91 S. Ct. at 1281.

eliminating earlier violations." *Lockett II*, 111 F.3d at 843 (emphasis added) (internal quotations and citation omitted).

Second, discerning a school board's good faith is in some respects a subjective finding. Thus, such a finding depends in part on the judge's personal observation of the witnesses. The magistrate judge, not the district judge, observed all of the witnesses at the evidentiary hearing. Granted, the district judge was free under 28 U.S.C. § 636 to make a *de novo* determination of the magistrate judge's findings. In other contexts, however, we have cautioned district judges from overruling a magistrate ***947** judge's finding where credibility determinations are dispositive. *See, e.g., Proffitt v. Wainwright*, 685 F.2d 1227, 1237 (11th Cir.1982) (noting that, in criminal or habeas corpus cases, a district judge's reasons for rejecting a report and recommendation must be consistent with the credibility choices made by a magistrate). In addition, the rationale for deferring to a district court's finding of fact is that a trial judge is aware of the variations in demeanor which bear so heavily in making a subjective determination. *See Anderson*, 470 U.S. at 575, 105 S. Ct. at 1512. Where, as here, a district judge does not personally observe the witnesses in making a subjective finding of fact, we view such a finding with skepticism, especially where, as here, the finding is contrary to the one recommended by the judicial official who observed the witnesses.

III. CONCLUSION

The district judge's finding that Appellants have not achieved unitary status was tainted and infected by reliance on an incorrect legal standard. As such, we reverse the district judge's orders of October 26, 1998, and December 4, 1998. Upon remand, the district court shall enter judgment declaring the Hillsborough County school system unitary. Therefore,

federal judicial supervision of the Hillsborough County school system shall cease.

REVERSED and REMANDED.

Order of the District Court of December 4, 1998

United States District Court,

M.D. Florida,
Tampa Division.

Andrew L. MANNING, et al., Plaintiffs,

v.

THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, Florida (formerly Board of Public Instruction of Hillsborough County, Florida), et al., Defendants.

No. 58-3554-CIV-T-17.

Dec. 4, 1998.

***1355** Victor A. Bolden, Marianne Engelman Lado, Jacqueline A. Berrien, NAACP Legal Defense & Educational Fund, Inc., New York, NY, Warren H. Dawson, Dawson & Griffin, P.A., Tampa, FL, for Andrew L. Manning, Shayron B. Reed, Sanders B. Reed, plaintiffs.

Thomas M. Gonzalez, Thompson, Sizemore & Gonzalez, P.A., Walter Crosby Few, Few & Ayala, P.A., Tampa, FL, for Board of Public Instruction of Hillsborough County, FL, defendants.

ORDER

KOVACHEVICH, Chief Judge.

This cause comes before the Court on Defendants'

Motion to Alter or Amend Judgment (Docket No. 822)[1] and the Plaintiffs' response (Docket No. 823).

As a preliminary matter, Defendants explain that they have begun to take appropriate steps, including scheduling meetings to conduct open discussions with Plaintiffs and soliciting input from the parents of school attending children and other members of the public. Moreover, Defendants emphasize that they are reviewing desegregation techniques which are available to them. These are certainly positive steps and the Court is anxious to see the results.

Nevertheless, Defendants request a further explanation of this Court's October 26, 1998, Order so that the parties will have a common interpretation of the Order. Defendants state that, "[d]espite numerous readings of the Order, the Defendants and their representatives and counsel are in substantial doubt as to exactly what actions they must, or indeed, may, take in order to satisfy the Court." However, Defendants stress that they do not seek a specific description of what means they may employ to meet the Court's requirements. In other words, Defendants seek a specific description of "the Court's requirements," not a means for meeting those requirements.

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[1]Defendants file their Motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Rule 59(e) permits a district court to entertain a motion to alter or amend a judgment. A party can invoke the rule to direct a court's attention to matters such as newly discovered evidence or a manifest error of law or fact. A motion to alter or amend a judgment is not appropriately used to advance arguments or theories that could and should have been made before the district court rendered a judgment, or to present evidence that was available earlier. Consequently, Defendants' Motion will be treated solely as a Motion for Clarification.

Notwithstanding, Defendants' second paragraph of their memorandum states:

> The Court suggests that the Defendants "should evaluate desegregation tools which have been successful in other districts." (Order, page 109). It refers to "desegregative devices" which were available to the Defendants, but not used. (Order, page 61). It does not, however, describe these opportunities, nor does it provide any other direction.

Defendants then argue in a footnote, "[i]n fact, neither the Plaintiffs nor the Court has pointed to any specific action which the Defendants could or should have taken to meet their obligation to desegregate to the 'maximum extent practicable.'" Contrary to Defendants' assertions, Defendants seek to be told, specifically, which desegregation tools to use.

The Court has already pointed to deficiencies in Defendants' desegregation performance and will not, in fact, describe "specific action" which can be taken. However, if Defendants are unable to discern the appropriate measures to take on their own, the Court will hire experts of its own choosing to carry out the task for Defendants, at Defendants' expense, of course.

In addition, Defendants emphasize that during the course of this litigation, Plaintiffs stated that Defendants were complying with the Court's Desegregation Order, ***1356** and that the plan was effective. Moreover, Defendants improperly raise arguments already considered by the Court concerning Plaintiffs' failure to object to Defendants' actions. Significantly, the Court, not Plaintiffs, must determine whether unitary status has been attained. Any posturing that has taken place between the parties is inconsequential to this Court's determination. Perhaps this concept has hindered Defendants' accomplishments

over the years. Defendants' obligations remain until "the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 436, 96 S. Ct. 2697, 49 L. Ed. 2d 599 (1976). A judicial determination as to whether Defendants have accomplished their affirmative duty was never sought until this Court prodded Defendants to see where this case was going. Consequently, the fact that Plaintiffs once argued in a brief that the schools were desegregated, in order to prevent action sought by Defendants, should not be repeatedly emphasized to the Court.

Equally as unproductive, "Defendants ask the Court to consider that 'inaction' by a party who believes it to be consistent with the Court's directive may be error, but is not apathy. They ask as well that the Court remember that the Defendants did not rely solely on the Court's *ex parte* oral interpretations of its Order, but on a more public form of information as well." Defendants continue that the Court should acknowledge that the Court did not require any alteration of Defendants' action since 1974.

If Defendants' feelings have been hurt by the Court's Order denying unitary status; perhaps they expect an apology from the Court. Defendants should refrain from filing any additional motions in an attempt to explain why the Court should not unfairly characterize their inaction. There is a very complex and significant task to be accomplished in Hillsborough County. If attaining unitary status is going to be impaired because Defendants feel that they have been personally offended by constructive, and blatantly honest, criticisms, there are larger problems afoot in Hillsborough County.

On page 19 of their Memorandum, Defendants argue, "[i]f the Court intends a holding in its Order that the Defendants' chances of attaining a finding of unitary status were doomed by acts not taken in 1976, by Board members and administrators who are no longer associated with the School board, then they ask for reconsideration of that conclusion." Apparently, this point needs to be made crystal clear: this case concerns the operations of a public school system, not individuals personally. The school system must be operated on a nondiscriminatory basis and all vestiges of the prior constitutional violations must be eliminated to the maximum extent practicable. This is true regardless of the particular individuals acting for the School Board at any given time. To even suggest that acts not taken by the particular individuals currently sitting on the School Board should not be considered is absolutely ridiculous. The school system does not magically become desegregated simply because the ball has changed hands. Eliminating the vestiges of past discrimination to the maximum extent practicable is not limited to the tenure of individual Board Members. The Court will not address similar arguments raised in Defendants' Memorandum. This is not productive.

Despite Defendants' use of the instant Motion to defend their actions which have already been ruled upon, Defendants have raised genuine issues regarding their obligations. Moreover, Defendants discuss the fact that the 1971 Desegregation Order did not provide much detail and they explain that the School Board needs additional guidance with regards to their obligations.

I. The Nature of the Court's Conclusions Relating to Student Assignment.

In the October 26, 1998, Order, the Court stated that while demographics have played a significant role in

Hillsborough County, the Court is not convinced that a shift in demographics and residential patterns explains the racial imbalance in the Hillsborough County school system. The Court also emphasized that the increase in ***1357** the black population was not nearly as drastic as the increases experienced in cases cited by Defendants. Because the school system has not yet achieved unitary status, Plaintiffs are entitled to a presumption that the current disparities are the result of prior segregation. Defendant has the burden to prove otherwise.

In their Memorandum, Defendants ask the Court to consider whether its inability to determine the extent of the role played by demographics in producing numbers which are central to its concerns, and, by extension, its inability to conclude with certainty whether the schools of Hillsborough County are in fact unitary, are the product of Defendants' counsel's unartfulness in presenting their evidence, as opposed to the reality which that evidence sought, but failed, to portray. Specifically, the Defendants ask the Court to consider whether or not additional or different data are needed, and/or whether further hearings would be helpful.

Undoubtedly, additional data is required. However, this is not simply a "numbers game" and the Court went to great lengths to explain that Defendants have not demonstrated a good faith commitment to desegregating the school system. In order to achieve constitutional compliance, a school district is obligated to comply, in good faith, with the court's desegregation decree and "take whatever [affirmative] steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. School Bd. of New Kent County*, 391 U.S. 430, 437-39, 88 S. Ct. 1689, 20 L. Ed. 2d.2d 716 (1968).

Defendants need to provide the Court with additional data concerning how successful their desegregation efforts have

been. Significantly, Defendants should provide the Court with statistics regarding the racial compositions of the schools in the county from 1995 to the present. Defendants should explain whether racial compositions have improved or worsened. If they have worsened, Defendants should explain why, and what is going to be done. Defendants should provide the Court with additional data concerning their majority to minority transfer program and explain whether this has been successful. Defendants should look at other school districts similar in size to Hillsborough County and determine whether the transfer program in Hillsborough County can be improved. Defendants should gather current statistics in connection with their magnet schools and programs and determine whether the circumstances have improved since 1995 and whether Defendants' predictions have proven accurate. Moreover, Defendants should compare the quality and success of their magnet schools and programs with other school districts similar in size.

In its Order, the Court directed Defendants' attention to the various other ethnic groups represented in Hillsborough County. Defendants correctly assert that, until a constitutional violation has been alleged and established as to a specific minority, the Court may not issue injunctive relief. However, Defendants can certainly provide accurate statistics to carry their burden. While the parties have been arguing that, for instance, one school is 90% black, it may support Defendants' other demographics statistics to have accurate statistics showing that the school is really 60% black, 20% Hispanic, 5% Asian, 5% other, and 10% white. The County has changed a great deal since 1971 and the Court is interested in a true picture of the composition of the schools, not because a constitutional violation has been alleged, but because Defendants are trying to present an accurate, and current, picture of the school system.

The breakdown of the different ethnic groups is not crucial to Defendants attaining unitary status and Defendants

can present their case anyway they choose. Defendants also seek guidance as to the significance of particular race ratios. Admittedly, the "standard" used has been the Court's 80%/20% ideal. As noted above, the actual populations of ethnic groups in the County may illustrate that a new "standard" should be used or additional factors considered. The use of the 40% threshold is to measure Defendants' effectiveness at desegregating the County schools. Because the parties have not challenged whether the population ***1358** as a whole is roughly 80%/20%, the Court has continued to use this to determine Defendants' progress. Defendants' progress entails not only desegregating the schools because of past discrimination, but demonstrating that it has strategically planned to avoid discrimination in the future. In other words, Defendants do not have to ensure that every school in the system is precisely 80% white and 20% black. However, the Court must have a reference point to evaluate Defendants' efforts. Therefore, Defendants are not held steadfastly to any particular race ratios, but must have reasonable, and supportable, explanations for schools that are substantially disproportionate in their racial composition. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26, 91 S. Ct. 1267, 28 L. ED. 2D.2d 554 (1971).

Defendants claim that the Court fails to provide a "threshold by which racial identifiability may be identified as requiring action." Defendants have the burden to prove that the school system has been desegregated. Until unitary status has been declared, Defendants are required to take affirmative steps to desegregate the system. The Court cannot say that every time an individual school becomes 41% black, action must be taken at that school. But when the system is evaluated in its entirety and several schools are becoming more and more segregated, Defendants must be able to explain why. A 20% variance from the "ideal race ratios," which have yet to be proven inappropriate as a starting point, indicates that a school is on its

way to becoming majority black. The School Board should become concerned enough to investigate its cause, especially if several schools are becoming majority black. The Court has not denied Defendants' request to be declared unitary simply because a school has reached a particular race ratio. However, the Court did issue its ruling based on the increase in the number of schools which indicate a source of concern and Defendants' failure to take affirmative steps or demonstrate that they have strategically planned for the future. It is not the role of the Court to engage in strategic planning. The Court's role is to oversee the strategic planning that is entirely the responsibility of the School Board.

Another comparison to the efforts taken by the school district in *Freeman* is instructive. In *Freeman*, the school district's desegregation plan was adopted by the district court in 1969. *Freeman v. Pitts*, 503 U.S. 467, 471, 112 S. Ct. 1430, 118 L. ED. 2D.2d 108 (1992). "Remarkable changes in the racial composition of the county presented [the school district] and the District Court with a student population in 1986 far different from the one they set out to integrate in 1969." *Id.* at 475, 112 S. Ct. 1430 (emphasis added). The racial proportions of the student population was further described as a "striking change." *Id.* (emphasis added). "The school system that the District Court ordered desegregated in 1969 had 5.6% black students; by 1986 the percentage of black students was 47%." *Id.* (emphasis added). The county also experienced "radical" demographic changes, and, as a result, the northern half of the county became predominately white and the southern half became predominately black. *Id.* "In 1970, there were 7,615 nonwhites living in the northern part of DeKalb County and 11,508 nonwhites in the southern part of the county. By 1980, there were 15,365 nonwhites living in the northern part of the county, and 87,583 nonwhites in the southern part." *Id.* The district court in *Freeman* found that the demographic shifts had an immense effect on the racial compositions of the county's

schools. *Id.* at 476, 112 S. Ct. 1430.

When the school district sought a declaration of unitary status in 1986, the district court noted that the school district "had taken specific steps to combat the effects of demographics on the racial mix of the schools." *Id.* at 479, 112 S. Ct. 1430. The school district, "on its own initiative, started an M-to-M program in the 1972 school year. The program was a marked success. Participation increased with each passing year, so that in the 1986-1987 school year, 4,500 of the 72,000 students enrolled in [the school system] participated." *Id.* (emphasis added). In 1986, the district court found that 19% of the students in the school system had an integrated learning experience as a ***1359** result of the M-to-M program. *Id.* Moreover, as early as 1980, the school district in *Freeman* voluntarily instituted a magnet school program in the schools located in the middle of the county in order to attract students from the segregated northern and southern parts of the county.

The district court found that the school district's actions "achieved maximum practical desegregation from 1969 to 1986." *Id.* at 480, 112 S. Ct. 1430. The district court in *Freeman* also stated that it was "convinced that any further actions taken by defendants, while the actions might have made marginal adjustments in the population trends, would not have offset the factors that were described above and the same racial segregation would have occurred at approximately the same speed." *Id.* at 480-81, 112 S. Ct. 1430 (quoting the district court's opinion).

Conversely, in the case at hand, the increase in black students has only been from 17.4% in 1970, to 19.4% in 1990. This is hardly "striking," "radical," or "remarkable." Furthermore, the M-to-M transfer program has been a marked failure. Defendants had not granted one (1) M-To-M transfer as of 1996. Finally, Defendants failed to develop magnet schools

and programs, except for the magnet program at Tampa Bay Technical High School, until 1993. This Court is not convinced that Defendants' inaction has not contributed to the degree and magnitude of segregation in Hillsborough County's schools. Significantly, each instance of a failure or refusal to fulfill Defendants' "affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459, 99 S. Ct. 2941, 61 L. ED. 2D.2d 666 (1979). If you choose *not* to decide, you have made a choice.

The central question which Defendants seek to have clarified is whether Defendants have an obligation to use any desegregative techniques in response to racial ratios which they did not cause through historical or current unlawful inaction. The only way the Court can possibly answer Defendants' question is with another question: "Who has made the determination that Defendants did not cause the imbalances?" This Court has not made that determination. Although Defendants spend a great deal of effort trying to convince the Court that Plaintiffs, at one time, made that determination, Defendants have missed the point of this litigation. Defendants cannot unilaterally determine that they have not caused the current segregation in the schools. That is precisely why they must continue to take affirmative action to desegregate the schools until they seek unitary status and the Court finds that the school system is unitary. Moreover, Defendants cannot assume that demographic shifts are necessarily independent of prior unconstitutional practices. "The school district bears the burden of showing that no [ ] causal link exists [between the racial imbalances and the prior unconstitutional practices and unconstitutional inaction], and absent such a showing, the district must continue to make affirmative efforts to remedy racial imbalances while subject to court order." *Lockett v. Board of Educ. of Muscogee Co. Sch. Dist.*, 92 F.3d 1092, 1099 (11th Cir.1996).

District courts must assert jurisdiction over school systems in order to ensure compliance with the courts' remedial orders and the Constitution until such time as a district court determines that the vestiges of past discrimination have been eliminated to the maximum extent practicable. In determining whether Defendants have satisfied their burden of proving that the current imbalances in the school system are not the result of present or past discriminatory action, the Court must consider:

> (1) whether the racial imbalances are traceable, in a proximate way, to constitutional violations, (2) whether the school district has exhibited a record of full and satisfactory compliance with the decree, and (3) "whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the laws and the constitution that were the predicate for judicial intervention in the first place."

Lockett, 92 F.3d at 1097 (quoting *Freeman*, 503 U.S. at 494, 112 S. Ct. 1430). The Court ***1360** has considered these factors in its previous order and found that the racial imbalances in Hillsborough County appear traceable to Defendants' prior unconstitutional practices and the continued unconstitutional inaction. Moreover, the Court emphasized that Defendants have not demonstrated a good faith commitment to desegregating the County schools.

"The good faith requirement assures parents, students, and the public that they will be protected against further injuries or stigma, by making 'it unlikely that the school district would return to its former ways.' " *Id.* at 1100 (citations omitted). "[A] finding of good faith . . . reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual." *Id.* (quoting *Morgan v. Nucci*, 831 F.2d

313, 321 (1st Cir.1987)). Defendants have not satisfied this requirement.

The Court cannot tell Defendants which specific means to employ. However, their obligations should be clear. Defendants must make efforts to affirmatively desegregate the school system and submit proof that they have, in fact, done so to the maximum extent practicable. An integral part of this proof will be documentation of the strategic planning Defendants have engaged in to ensure that discrimination does not occur in the future. A history and pattern of good faith and affirmative efforts will speak for itself. School districts, such as the one in Freeman, typically seek unitary status and provide proof of what the school district has done in the past, and, that it is continuing to do everything practicable, but that the demographic changes have been so overwhelming that the continued efforts are ineffective, and, the school district should be released from supervision. Conversely, Defendants have furnished proof that they have done some things in the past, but provided nothing to suggest that the Court should not look at all the things it hasn't done, or the ineffectiveness of what it has done, because there has been a 2% shift in the demography of Hillsborough County.

Defendants have expressed additional concerns because the Court's Order "has imposed on the Defendants several new but unspecified reporting obligations." Specifically, Defendants seek clarification because the Court stressed that Defendants should continue to consider busing burdens in assignment and site selection decisions. The Court is not requiring Defendants to monitor particular statistics in connection with the busing burden. However, the Court wants to emphasize that the busing issue should be considered in Defendants' future decisions. The Court feels compelled to caution Defendants that busing children is of great public importance and failure to account to the public for its decisions could become a huge obstacle down

the road. Moreover, the busing issue is tied to the area of site selection, which has been specifically addressed in this Court's Order and the Supreme Court opinions sited therein. Defendants must consider these interrelated aspects of the school system operations, both now and over the long haul.

Plaintiffs specifically raised the issue of Defendants' failure to document decisions with regards to site selection. Wouldn't it be great if, in the future, Defendants were able to say: "Here it is; we looked at the land value, population, growth patterns, budget, racial compositions, etc., *and even more, without having been ordered by the Court to do so. We considered the burdens imposed on all students in the system; here is what has happened,* along with other important considerations".

Nevertheless, Defendants shall provide the Court with the statistics discussed above concerning racial compositions in the schools since 1995, M-to-M transfers, and comparisons to other districts of similar size. If the statistics demonstrate that the number of schools which are racially imbalanced has increased, Defendants should brief the Court on why this has taken place, who is responsible for taking action, what action will be taken in the future, whether additional experts are needed, and other relevant facts to demonstrate that Defendants have fully embraced their obligations, have a strategy, and will have success in the future. Moreover, if the number of magnet programs in Hillsborough is deficient in comparison to similar ***1361** districts, Defendants should be prepared to explain why.

Defendants also ask the Court to alter its Order and declare the school system unitary in all areas except for student assignment. However, the Court declines to do so at this time because of the new and creative efforts that the Court foresees being implemented in Hillsborough County. "[O]ne of the prerequisites to relinquishment of control in whole or in part is

that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution." *Freeman*, 503 U.S. at 490, 112 S. Ct. 1430. The Court expects that Defendants' future efforts will impact the various operations of the school system and the Court deems it appropriate to retain supervision. The Court has already discussed the relationships between some of the Green factors and further discussion is unnecessary.

Finally, the Court certainly cannot provide the parties with a specific date on which the school system will be declared unitary. Nevertheless, the Court anticipates the parties will have the 2000 Census data available to them by the time Defendants have had sufficient time to demonstrate a pattern of good faith compliance and prove that supervision is no longer necessary. Accordingly, it is

ORDERED that Defendants' Motion to Alter or Amend (Docket no. 822) be **DENIED;** alternatively, the Court has treated Defendants' Motion as a Motion for Clarification which has been addressed above and granted only in part.

Opinion of District Court of October 26, 1998

United States District Court,
M.D. Florida, Tampa Division.

Andrew L. MANNING, et al., Plaintiffs,
v.
THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly Board of Public Instruction of Hillsborough County, Florida), et al., Defendants.

No. 58-3554-CIV-T-17.
Oct. 26, 1998.

*1281 Victor A. Bolden, Marianne Engelman Lado, Jacqueline A. Berrien, NAACP Legal Defense & Educational Fund, Inc., New York, NY, for Andrew L. Manning.

Warren H. Dawson, Dawson & Griffin, P.A., Tampa, FL, Victor A. Bolden, Marianne Engelman Lado, Jacqueline A. Berrien, NAACP Legal Defense & Educational Fund, Inc., New York, NY, for Shayron B. Reed, Sandra E. Reed, Nathaniel Cannon, Norman Thomas Cannon, Tyrone Cannon, Darnel Cannon, Gail Rene Myers, plaintiffs.

Thomas M. Gonzalez, Thompson, Sizemore & Gonzalez, P.A., Tampa, FL, Walter Crosby Few, Few & Ayala, P.A., Tampa, FL, for Board of Public Instruction of Hillsborough County, FL, J. Crockett Farnell, defendants.

ORDER

KOVACHEVICH , Chief Judge.

This cause comes before the Court on the Court's Order recommitting this matter to the Magistrate Judge for a

determination of whether the Hillsborough County school system has attained unitary status (Docket No. 709), the assigned Magistrate Judge's Report and Recommendation (Docket No. 809), Plaintiffs' Objections to Report and Recommendation (Docket No. 812), Brief in Support of Plaintiffs' Objections (Docket No. 813), and Defendants' Response to Plaintiffs' Objections to Report and Recommendation (Docket No. 815).[1] This action was filed on December 12, 1958.

Plaintiffs represent a class consisting of all black children who attended the public schools of Hillsborough County, and the parents and guardians of those children. The complaint alleged that Defendants, the Hillsborough County School Board (formerly Board of Public Instruction of Hillsborough County), acting under the color of state law, had operated, and continued to operate the public school system in Hillsborough County on a racially segregated basis.

The Court initially dismissed the complaint for the Plaintiffs' failure to exhaust administrative remedies; however, the dismissal was reversed and remanded by the court of appeals. *See Mannings v. Board of Public Instruction*, 277 F.2d 370, 375 (5th Cir.1960). Subsequently, the Court conducted a bench trial and on August 21, 1962, entered an order finding that Defendants were, in fact, maintaining an unlawfully segregated system of public schools. Consequently, the Court enjoined Defendants from operating a racially discriminatory school system and allowed Defendants until October 30, 1962,

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[1]This Court recommitted this matter to the assigned Magistrate Judge prior to ruling on Plaintiffs' Amended Motion to Enforce (Docket No. 753). The issues raised in said motion are subsumed by the rulings in this Order.

in which to file a comprehensive plan for the desegregation of the Hillsborough County schools.

Despite the several desegregation plans devised by Defendants, the school system remained segregated. *See Mannings v. Board of Public Instruction of Hillsborough County*, 306 F. Supp. 497 (M.D. Fla.1969) . Significantly, in 1971, the United States Supreme Court issued several opinions which defined with particularity the responsibilities of school authorities and the scope of powers of federal courts in eliminating state-imposed segregation in the public school systems. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971); *North Carolina State Bd. of Education v. Swann*, 402 U.S. 43, 91 S. Ct. 1284, 28 L. Ed. 2d 586 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 91 S. Ct. 1287, 28 L. Ed. 2d 582 (1971); and *Davis v. Board of School Commissioners*, 402 U.S. 33, 91 S. Ct. 1289, 28 L. Ed. 2d 577 (1971). On May 11, 1971, the Court entered an Order explaining that Hillsborough County's school system remained ***1282** segregated and required Defendants to prepare and submit a comprehensive desegregation plan for the Hillsborough County school system.

In the May 11, 1971, Order, the Court explained that, despite the fact that black students comprised only 19% of the total student population, 69% of these students were attending twenty-eight (28) schools which had majority black populations. However, during this same time period, 69% of the white students attended 65 schools which were all, or at least 95% white. The Court emphasized that it had been unable to find a single instance in which Defendants had taken positive steps to end segregation at a black school and, consequently, segregation returned fortuitously. (May 11, 1971, Order at 39).

In order to remedy the constitutional violation, the Court directed Defendants to submit a comprehensive desegregation

plan which was to become effective at the beginning of the 1971-1972 school year, and the Court provided Defendants with the following guidelines:

> (a) The Plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county now having a school population at least 50% black.
>
> (b) In preparing the plan the school board shall begin with the proposition that a white-black ratio of 86%/14% in the senior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation.

(May 11, 1971, Order at 43-44). The May 11, 1971, Order primarily addressed Defendants' responsibility to remedy the segregative policies and practices in connection with student assignments. However, the Court also reiterated the importance of site location for new schools with regards to desegregation.

On July 2, 1971, the Court approved for implementation the comprehensive plan submitted by Defendants. ("July 2, 1971 or 1971 Order"). The plan approved by the Court provided that none of the established black schools would continue in their then existing configurations. Pursuant to the plan, physical plants that were serviceable would be converted to sixth and seventh grade centers. Those facilities which were not capable of conversion, were closed.

The 1971 desegregation plan was designed to desegregate student enrollments in grades one (1) through

twelve (12); neither kindergarten nor pre-school was included.[2] All schools were assigned attendance boundaries which, when combined with the transportation of certain students, was expected to eliminate all majority black schools. The students attending the predominately black schools were assigned to various schools based on the location of their residence or the transportation of groups of these students from satellite zones.[3] As a result, black students were transported to provide racially mixed populations for grades one (1) through five (5), and eight (8) through twelve (12), whereas, white students were transported to sixth and seventh grade centers.

After the Court entered the July 2, 1971, Order, Plaintiffs filed a motion which requested that any desegregation plan adopted by the Court "include faculty desegregation and policies and general reporting provisions and that the Court retain jurisdiction." (Docket No. 243). The Court subsequently required Defendants to submit reports and retained jurisdiction, but did not grant Plaintiffs' request regarding faculty and staff assignments. Nevertheless, in a previous Order issued on August 25, 1970, the Court had directed that principals, teachers, teacher-aides, and other staff, who work directly with children at a school, be assigned so that the staff's racial composition would not reflect any intention that the school be either black or white. Teachers and other staff members were to be assigned so that the race ratio ***1283** would be

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[2]Initially kindergartens did not exist in the public school system; therefore they were excluded by the 1971 Plan. Subsequently, kindergartens were established by the School Board and the Court entered an Order which permitted kindergarten students to attend neighborhood schools, without regard to student race ratios.

[3]A "satellite zone" is an area which is not contiguous with the main attendance zone surrounding a school.

substantially similar to the system-wide ratio. In its July 2, 1971, Order, the Court continued these requirements, but specifically declined to require any detailed procedure with regard to faculty assignments, noting that, faculty desegregation "was accomplished at every school location in the 1970 school year;" therefore, no procedural requirements were necessary.

Also, in the July 2, 1971, Order, the Court explained that the previously ordered relief of majority-to-minority transfers, other transfer rules, and Bi-Racial Committee approval of site locations, may not be required if Defendants' plan was effectuated and accomplished. However, the Court required the continuation of each of these requirements "to be available and used as necessary." (July 2, 1971, Order at 9). In addition, the Court ordered Defendants to regularly reexamine their transportation system, all facilities, and all extracurricular activities, in order to assure that they were maintained, operated, and conducted on a nonsegregated, nondiscriminatory basis. *Id.* at 10.

In the 1971-1972 school year, the School Board had desegregated all Hillsborough County Schools, with regards to student assignment; no majority black school existed in the county. (T1 at 13).[4] Each year following implementation of the 1971 Plan, Defendants filed at least two (2) reports with the Court, copies of which were served upon opposing counsel. The first report provided enrollments by race and grade, as well as, faculty assignments, by race, at each school facility operated for grades one (1) through twelve (12) in the system. The

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[4]Reference to the parties' exhibits at the unitary status hearing are denoted by the letters "PX" or "DX" followed by the exhibit number. References to the seven (7) volume transcript of the hearing are denoted by the letter "T" followed by the volume and page number.

second report enumerated proposed changes in student assignments, if any, which would become effective in the following school year. (DX 6 and 7). The reports of proposed student assignment modifications included, *inter alia,* boundary changes occasioned by overcrowding and student assignment modifications necessitated by the construction of new schools. The reports also included projections of anticipated enrollments, by race, at schools affected by the proposed changes. Joint Pre-Evidentiary Hearing Statement, (Docket No. 767), Statement of Admitted Facts at § 13 ("Stipulation").

As of October 27, 1971, there were no majority black schools among the school district's 122 schools and only one (1) school, Lee Elementary, was more than 40% black. However, during the next few years, the percentage of black students increased at several schools. For example, during the next two (2) years, Edison Elementary became 40% black, DeSoto Elementary became 39% black, and Gary Elementary became 39% black. (DX 7).

The 1974 Annual Report submitted by Defendants reflected that there were 128 public schools in Hillsborough County. The report also indicated that one (1) school, Lee Elementary, had become majority black. In addition, Cleveland, DeSoto, Edison, and Gary Elementary had black student populations which exceeded 40%. After receiving this report, the Court, *sua sponte,* directed Defendants to file a supplemental plan designed to insure that, "the requirements of the Court's previous orders insofar as they relate to Lee Elementary School will be complied with as of the beginning of the 1975-1976 school year." (January 14, 1975, Order at 1); (Stipulation at § 9). In addition, the Court directed Defendants' attention to the other schools in the system which were experiencing disproportionate increases in black students. *Id.*

On March 21, 1975, the School Board submitted a supplemental plan to the Court. Defendants' plan proposed to convert Lee Elementary to a sixth grade center replacing the Meacham facility. Moreover, the plan proposed to reassign Lee's former attendance area among seven (7) different elementary schools for grades one (1) through five (5). (Stipulation at § 10). On June 3, 1975, the Court ordered implementation of the supplemental plan for Lee Elementary commencing with the 1975-1976 school year. (Stipulation at § 11).

The 1975 Annual Report reflected that there were no majority black schools. However, five (5) schools, out of 128, had student ***1284** populations which were greater than 40% black (Cleveland, Edison, Gary, Graham, and Palm River elementary schools). During the 1975-1976 school year, Cleveland became a majority black school (55%). In addition, Edison became 47% black, Gary became 47% black, and Graham became 49% black. Despite the projected student populations delineated in Defendants' supplemental plan, there was no decrease in the percentage of black students in attendance at Cleveland and Gary. (DX 7).

At least since January 14, 1975, the Court has not directed the School Board to prepare a supplemental plan or to take any action with respect to the racial composition of any of its schools. Moreover, Plaintiffs did not seek relief or enforcement of any obligation imposed by the Court until June 1994. Furthermore, Plaintiffs did not file written objections with the Court respecting the actual or projected enrollments of any schools in Hillsborough County. (Stipulation at § 15). In 1980, Plaintiffs objected to the proposed closing of George Washington Junior High School and Glover Elementary; however, Plaintiffs' stated reasons were not related to the anticipated racial compositions of the affected schools.

In 1990, Plaintiffs objected, for reasons other than anticipated racial composition, to the proposed conversion of Blake seventh grade center to a high school. The Court disapproved Defendants' proposal, without prejudice to subsequent resubmission as part of a comprehensive restructuring plan. (Docket No. 419).

Since the 1977-1978 school year, Defendants have made more than 300 modifications in student assignments to relieve overcrowding, to accommodate the opening of newly constructed facilities, or for other reasons, but not specifically for the purpose of affecting the race ratio of a school. (Stipulation at § 19); (DX 6); (T2 at 15). Although changes to attendance patterns have not been made specifically to address race ratios at the schools, Defendants have taken into account the effect of the change on the racial composition of the schools. (Stipulation at § 22); (T1 at 15, 23).

The Bi-Racial Committee, required by the July 2, 1971, Order, has existed since the time of the Order and has reviewed proposed boundary changes, the sites of new schools, and special assignments in accordance with the Court's Order. (T1 at 18-19). The Bi-Racial Committee provides input and advice on these proposals before they come before the School Board (T1 at 19-20). However, the Bi-Racial Committee is strictly an advisory board and does not have the authority to either approve or reject boundary changes. (T1 at 19).

In addition, while making adjustments to student assignments to deal with problems of overcrowding or with new school construction, Defendants, where practicable, reassigned, or divided and partially reassigned, existing satellite zones in a manner that moved enrollments toward the system-wide race ratio. (Stipulation at § 23); (T1 at 25-27); (DX 4). For instance, when the School Board constructed a new facility in an area having a small resident black student population within the

contiguous zone surrounding the facility, the School Board reassigned preexisting satellite zones to increase the number of black students assigned to the new facility. (Stipulation at § 24); (T1 at 26, 33).

When modifying student assignments to relieve overcrowding or in connection with the opening of a new facility, the School Board has, since the 1975-1976 school year, created non-contiguous zones or satellites in at least seven (7) instances. In most instances, students reassigned on a non-contiguous basis were being transported to their former school of assignment before the change. (Stipulation at § 25). However, the School Board has never created a new non-contiguous or satellite zone solely for the purpose of altering the racial enrollment at a school, including schools which were majority black. (Stipulation § 26); (T1 at 14-15).

Since 1986, Defendants have not initiated boundary changes, not otherwise being considered for reasons such as overcrowding or the opening of a newly constructed facility, for the purpose of altering the racial composition at a school, including those schools that had majority black enrollments. (Stipulation § 27).

***1285** The majority to minority ("MTM") transfer program which was required by the July 2, 1971, Order has existed since the time of the Order. However, this program has not been widely publicized in the past. Notwithstanding, the School Board recently directed that the program be publicized and the school district's staff has announced the program to the entire district in recent years. (T1 at 89, 92).

In November 1989, the Hillsborough County Superintendent of Schools, Dr. Walter L. Sickles, appointed a Task Force to Modify Single Grade Centers to investigate and make recommendations for reorganizing the school system so

as to establish middle schools. (Stipulation at § 28). A goal to be achieved by any recommended reorganization was the retention of a desegregated school system. (Stipulation at § 29). In late 1990 or early 1991, the School Board suggested to Plaintiffs' counsel that representatives of the parties and their counsel meet to consider the tentative Middle School Plan being developed by the Task Force, to determine whether a joint submission of the plan could be made to the Court. (Stipulation at § 30).

In early 1991, the Assistant Superintendent, James Randall, had an initial meeting with counsel for Plaintiffs. A more extensive meeting with counsel took place on March 15, 1991, attended by counsel for the parties, Dr. Sickles, Mr. Randall, and other staff members of the district, as well as, by Plaintiffs' educational and desegregation consultant, Dr. Leonard Stevens. (Stipulation at § 31). In connection with the March 15, 1991, meeting, Plaintiffs' representatives were provided with a document entitled "Proposed Cluster Plan," which described the working concept of a middle school reorganization which was being considered by the Task Force. (Stipulation at § 32). After several subsequent meetings, a formal report entitled "Middle School Task Force Report 3, July 1991" ("Task Force Report") was submitted to and approved by the School Board. The Task Force Report was tendered to Plaintiffs on August 20, 1991. (Stipulation at § 35).

Because the school system remained under the Court's supervision, Defendants were required to propose their Middle School Plan (also known as the "Cluster Plan") to the Court. The parties proposed an agreed order to the Court, which was approved and entered on October 24, 1991 ("Consent Order"). The Court explained that the Consent Order was the "result from the school district's comprehensive study of the educational advantages of reorganizing its grade structure to establish 'middle schools' serving grades 6-8, and that the

School Board's conclusion, following that study, that implementation of the middle school grade structure is desirable." (1991 Consent Order at 1). The Task Force Report was attached to and made a part of the Consent Order. (Stipulation at § 36).

The Task Force Report proposed modifications which were projected to be implemented over a seven (7) year period. The modifications included grade organization and student assignments in Hillsborough County in order to accommodate the establishment of middle schools. (1991 Consent Order at 2). Prior to implementation of the Cluster Plan, Hillsborough County public school students progressed from elementary schools, to single sixth or seventh-grade centers, which were established for desegregation purposes under the original desegregation plan, to junior high schools, and then to high schools. However, under the Middle School Plan, students would progress from kindergarten through fifth grade elementary schools, to middle schools having sixth, seventh, and eighth grades, and then to high schools. Thus, the single grade centers were to be converted to middle schools. In addition, implementation of the Middle School Plan involved creating attendance "clusters" which grouped elementary and middle schools around the high school which those students ultimately would attend. (Task Force Report at 10).

The Middle School Plan also involved the creation of magnet programs at some schools. (Task Force Report at 17-25). One of the purposes of developing the magnet programs was to help desegregate the schools. Some of the schools which were targeted for the programs were predominately black prior to 1971 and the School Board anticipated that these schools would become "black schools" again if the student ***1286** population was comprised solely of students from the surrounding neighborhoods as a result of the Middle School

Plan. (T1 at 66). The programs were designed to perpetuate racial balance. (T1 at 66-67).

> In the 1991 Consent Order, the Court explained that: The Court recognizes and anticipates that there will be modifications each year of the projected student assignment patterns contained in Appendix 1 to the Task Force Report to take account of demographic or other changes that occur. In making such modifications, the school district should seek to minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment ratios (see Task Force Report, at p. 14).

(1991 Consent Order at 5-6). However, in the Task Force Report, the School Board predicted that, under the Middle School Plan, there would be an increase, from thirty-six (36) to forty-six (46), in the number of schools that deviated from the 20/80 ratio by 10% or higher, and, an increase, from fifty- six (56) to seventy-two (72), in the number of schools that deviated from the 20/80 ratio 5% or less. Therefore, while the Middle School Plan was projected to increase the number of schools which had racial compositions closer to the district-wide ratio, the plan contemplated an increase in the number of schools that significantly varied from the 20/80 ratio.

The 1993 Annual Report reflects that the school system was comprised of 151 schools. As of the time of the report, there were eight (8) elementary schools and one (1) junior high school with student populations which were 50% or more black. Notably, Cleveland Elementary was 59% black and Robles Elementary was 90% black. In addition, there were five (5) elementary schools and two (2) junior high schools with student populations which were more than 40% black. (DX 7).

At the time of the 1996 hearing before the assigned Magistrate Judge, the Middle School Plan was in its sixth year and eleven (11) out of the seventeen (17) clusters had been implemented. The remaining six (6) clusters were targeted for the 1997-1998 school year. (Stipulation at § 37). Also, during this time period, the school system had nine (9) schools with magnet programs and had plans for five (5) additional magnet programs at other schools.

On June 1, 1994, Plaintiffs filed an Amended Motion to Enforce and Consent Order (Docket No. 439). In their Motion, Plaintiffs complained, for the first time, of the existence of schools where black students constituted at least 40% of the total student population. Plaintiffs alleged that the existence of these schools was a violation of the 1971 desegregation plan adopted by the Court. Plaintiffs also asserted that Defendants had not complied with the 1991 Consent Order, which provided that, in the event Defendants deviated from the student attendance patterns contained in the proposed Middle School Plan, they would "seek to minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment ratios." *See* (1991 Consent Order at 6) (citation omitted).

Plaintiffs' Motion pointed out that sixteen (16) schools, out of 149, had black student populations comprising 40% or more of the total student population. The sixteen (16) schools and the percentages of black students in each school, as of the 1995-1996 school year, was as follows: Robles Elementary (90%), Edison Elementary (75%), Sulphur Springs Elementary (74%), Oak Park Elementary (70%), Graham Elementary (67%), Foster Elementary (61%), Cleveland Elementary (57%), Shaw Elementary (56%), Witter Elementary (54%), Cahoon Elementary (52%), Clair Mel Elementary (49%), West Tampa Elementary (47%), DeSoto Elementary (43%), Van Buren Junior High (53%), Sligh Junior High (50%), and Dowdell

Junior High (49%). (DX 7). Each of these sixteen (16) schools were predominately white in 1971. (T1 at 33).

Plaintiffs' Motion to Enforce was referred to the Magistrate Judge for a Report and Recommendation. The assigned Magistrate Judge held an evidentiary hearing and recommended denial of Plaintiffs' Motion for failure to establish a violation of the Court's orders. On November 17, 1995, this Court deferred ruling on the Report and Recommendation, noting that Plaintiffs' Motion focused on student assignment. The Court explained that the issues raised in connection ***1287** with Plaintiffs' Motion to Enforce, "demonstrates the need to expand the scope of the inquiry to a full fledged determination of whether the Hillsborough County school system has in fact achieved unitary status." (Order Recommitting Matter to Magistrate, Docket No. 709 at 3). The Court further emphasized that, "[a]s it stands now, this Court and the parties are attempting to chart a course for the future without the benefit of a sound assessment of where we are currently." *Id.* at 3.

Consequently, the Court ordered:

> [A] showing by Defendants as to whether they have complied with this Court's 1971 Order regarding the factors set forth by the United States Supreme Court in *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968). In addition to student assignments, *Green* and *Freeman* require that faculty and staff assignments, transportation, extracurricular activities, facilities and resource allocation all be free from racial discrimination. In each of these areas, the School Board bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior constitutional violation of plaintiffs' rights. *Freeman*,

> 503 U.S. at 494[, 112 S. Ct. 1430]. The quality of education being received by all students and the good faith commitment by the School Board must be shown.

Id. at 4.

Following the referral Order, the assigned Magistrate Judge set a hearing on the unitary status determination and thereafter, conducted monthly status conferences with counsel for the parties. The parties exchanged discovery and retained expert witnesses. After the evidentiary hearing was concluded, the parties filed proposed findings of fact and conclusions of law which were supplemented after the filing of the 6th Annual Report to the Consent Order. Closing arguments were presented on May 22, 1997.

On August 26, 1997, the assigned Magistrate Judge issued a Report and Recommendation on the issue of whether the public school system of Hillsborough County has attained unitary status and should be released from court supervision. (Docket No. 809). After a comprehensive analysis of the issue, the assigned Magistrate Judge recommended that this Court find that Defendants have demonstrated that the public school system has attained unitary status. Although this Court agrees with a majority of the Magistrate Judge's analysis, the Court disagrees that school system should be released from supervision at this time.

As a preliminary matter, the Court feels compelled to address the concerns regarding the duration of this litigation and the passage of time since this Court provided Defendants with specific instructions. One theme which Defendants have reiterated continuously throughout this litigation has been that, even when the schools in the county began to deviate from the system-wide race ratios, Plaintiffs, and the Court, failed to challenge this occurrence. However, it is clear that Defendants

have been charged with the affirmative duty to desegregate the public schools in Hillsborough County to the maximum extent practicable. Regardless of the reasons for inaction by Plaintiffs and the Court, Defendants remain obligated to fully and diligently discharge their duties. Although Defendants were entitled to seek release from the Court's supervision at anytime after the desegregation plan was implemented, their obligations remain until this Court ruled otherwise.

A considerable amount of time has passed since the desegregation plan was implemented. Undoubtedly, Defendants' desegregation efforts demonstrate significant success; however, the amount of time Defendants have had to achieve this success detracts from their achievements. Moreover, while Defendants may have seen the delay in the instant rulings as merely an unfortunate reality of an overcrowded Court docket, the Court has viewed this delay as an additional opportunity for Defendants to demonstrate that Court supervision is no longer necessary. Defendants have failed to capture that opportunity.

DISCUSSION

Vacation or Modification

Plaintiffs' first objection concerns the Magistrate Judge's finding that attainment of unitary status constitutes a "changed circumstance" ***1288** warranting vacation of the 1991 Consent Order. The Magistrate Judge explained that modification of a consent order in a desegregation case may be considered when:

> (1) a significant change in facts or law warrants change and the proposed modification is suitably tailored to the change; (2) significant time has passed and the objectives of the original agreement have not been met; (3) continuance is not longer warranted; and/or (4)

> continuance would be inequitable and each side has legitimate interests to be considered.

® & R at 64) (citing *Jacksonville Branch NAACP v. Duval County Sch. Bd.*, 978 F.2d 1574, 1578 (11th Cir.1992)). Plaintiffs contend that attainment of unitary status cannot amount to a changed circumstance warranting modification or vacation of a consent order. Plaintiffs argue that, in order to disturb a consent order, the change in circumstances must not have been foreseen at the time the agreement was reached. Plaintiffs cite *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992), for the proposition that a significant change in factual conditions cannot be predicated on events actually anticipated at the time of entering of the decree. (Br. in Supp. of Pls.' Obj. to R & R at 12). Plaintiffs argue that, "[t]here is no evidence--nor could defendants present any plausible evidence--that unitary status was an unforeseen circumstance when the parties entered into the 1991 Consent Order." *Id.* (emphasis omitted).

Significantly, the respondents in *Rufo* argued that modification of a consent decree should only be allowed when a change in facts is both unforeseen and unforeseeable. 502 U.S. at 385, 112 S. Ct. 748. The Supreme Court explained that this standard proposed by the respondents would be even less flexible than the *Swift* test,[5] a test rejected by the Supreme Court

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[5]The *United States v. Swift & Co.*, 286 U.S. 106, 52 S. Ct. 460, 76 L. ED. 2D. 999 (1932), "standard," requiring "[n]othing less than a clear showing of grievous wrong evoked by new and unforseen conditions," has been limited to the particular facts in that case. The *Rufo* Court explained that, while the statement appears to be a hardening of the traditional flexible standard for modification of consent decrees when taken out of context, "the 'grievous wrong' language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees." 502 U.S.

as being too rigid to apply in all cases. *Id.* at 380, 385, 112 S. Ct. 748. Consequently, in the case at hand, Plaintiffs are proposing an unsupportable standard. Moreover, Defendants argue that, if the attainment of unitary status cannot serve as a sufficient change in circumstances to warrant dissolution of a consent decree, then no consent decree entered in a desegregation case could ever be dissolved, despite the achievement of the stated goals. Clearly, the consent order was not intended to require judicial supervision indefinitely.

Furthermore, the *Rufo* Court acknowledged a district court's need to be able to modify a decree in desegregation cases; "[b]ecause such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased." 502 U.S. at 380, 112 S. Ct. 748 (noting the upsurge in institutional reform litigation since *Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)). Moreover, "federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *See Board of Educ. of Oklahoma City Pub. Sch. v. Dowell*, 498 U.S. 237, 247, 111 S. Ct. 630, 112 L. Ed. 2d 715 (1991). Accordingly, if the purposes of this desegregation litigation, as incorporated in the 1991 Consent Order, have been fully achieved, then the Order can be modified and/or vacated. *Id.* In the instant case, modification is appropriate.

Interrelated *Green* Factors

Plaintiffs also argue that the Magistrate Judge failed to address the relationships among the many *Green* factors in determining that the school system is unitary. Plaintiffs contend that the grade restructuring plan being implemented, pursuant

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at 379-380, 112 S. Ct. 748.

to the 1991 Consent Order, is a seven-year plan that should be completed in order to fully evaluate its effectiveness and constitutional compliance. Consequently, Plaintiffs assert modification is inappropriate at this time. (Br. in Supp. of Pls.' Obj. to R & R at 5). Plaintiffs argue that many of the *Green* factors are inextricably linked to the grade restructuring ***1289** plan; therefore, the evaluation of the *Green* factors will depend on the full implementation of the plan and declaration of unitary status should be deferred.

Conversely, Defendants contend that continuation of the 1991 Consent Order is no longer warranted when the school system attains unitary status. Defendants argue that, if the school system is unitary, then the purpose of both the 1971 Order and 1991 Consent Order has been met; therefore, continuing supervision is unnecessary. (Def.'s Resp. to Pls.' Objs. to R & R at 3).

The Court must evaluate the *Green* factors in order to determine whether Defendants have attained unitary status. The interdependence of these factors is typically evaluated when an incremental release of Court supervision is contemplated. Contrary to Plaintiffs' assertion, the Magistrate Judge noted:

> However, if the Court has concerns about whether defendants have desegregated the elementary schools to the maximum extent practicable, continued supervision over student assignment could be retained while relinquishing jurisdiction over the other aspects of school operation as long as remedial action in the other areas is not necessary to achieve unitary status in the area of school assignment.

® & R at 88 n.56). Consequently, the Court will analyze the relationships among the *Green* factors at the appropriate time.

Unitary Status

I. Vestiges of Past Discrimination

Clearly, the attainment of unitary status is the goal of the instant desegregation litigation.[6] "The objective today remains to eliminate from public schools all vestiges of state-imposed segregation." *Swann*, 402 U.S. at 15, 91 S. Ct. 1267.

> The concept of unitariness has been a helpful one in defining the scope of the district courts' authority, for it conveys the central idea that a school district that was once a dual system must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn.

Freeman v. Pitts, 503 U.S. 467, 486, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992).

A. Defendants' Duty

The question is whether Defendants have successfully discharged the duty imposed by the Constitution to eliminate the vestiges of *de jure* segregation. District courts have been directed to assert jurisdiction over school systems which

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[6]In *Board of Educ. of Oklahoma City Pub. Schools, Independent School Dist. No. 89 v. Dowell*, 498 U.S. 237, 111 S. Ct. 630, 112 L. Ed. 2d 715 (1991), the Supreme Court expressed concerns for the inconsistent usage of the term "unitary." *Id.* at 245, 111 S. Ct. 630. The term "unitary" in this Order will be used to identify a school district that has completely remedied all vestiges of past discrimination and has met the mandate of *Brown v. Board of Educ.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. ED. 2D. 1083 (1955). *Id.*

previously practiced *de jure* segregation to ensure compliance with the constitutional mandate of *Brown v. Board of Educ.*, 347 U.S. 483, 74 S. Ct. 686, 98 L. ED. 2D. 873 (1954) ("*Brown I*"). *See Brown v. Board of Educ.*, 349 U.S. 294, 300-01, 75 S. Ct. 753, 99 L. ED. 2D. 1083 (1955) ("*Brown II*"). The courts' jurisdiction is to be exercised until a determination can be made that the vestiges of past discrimination have been eliminated to the maximum extent practicable. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971). In order to achieve constitutional compliance, a school district is obligated to comply, in good faith, with the court's desegregation decree and "take whatever [affirmative] steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green v. School Bd. of New Kent County*, 391 U.S. 430, 437-39, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968). Significantly, "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459, 99 S. Ct. 2941, 61 L. Ed. 2d 666 (1979). Consequently, Defendants should be released from judicial supervision only when the Court finds that: (1) Defendants have eliminated the vestiges of past discrimination ***1290** to the maximum extent practicable; and (2) Defendants have exhibited a record of full and satisfactory compliance with the Court's orders. Importantly, Defendants remain subject to the 1971 desegregation Order until this Court declares that the school district has achieved unitary status and has complied with the Court's orders in good faith. *See Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 439-40, 96 S. Ct. 2697, 49 L. Ed. 2d 599 (1976).

The School Board's responsibility to eliminate the vestiges of the unconstitutional *de jure* system "is required in order to ensure that the principal wrong of the de jure system, the injuries and stigma inflicted upon the race disfavored by the

violation, is no longer present." *Freeman v. Pitts*, 503 U.S. 467, 485, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992) . However, "a remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation." *Id.* at 489, 112 S. Ct. 1430; *Swann*, 402 U.S. at 16, 91 S. Ct. 1267 (explaining that judicial powers may be exercised only on the basis of a constitutional violation). The purpose of the remedial action is to eliminate the vestiges of state-compelled dual systems, not to remedy racial imbalances unrelated to *de jure* segregation. *Id.* at 494, 112 S. Ct. 1430. Nevertheless, if Defendants have not discharged their affirmative constitutional duty to dismantle the dual school system, the school district remains in violation of the Fourteenth Amendment.

(i) *Racially Identifiable*

In terms of describing the alleged shortcomings of Defendants' desegregation efforts, Plaintiffs assert that Defendants do not have a working definition of a desegregated school. The concept of "racial identifiability" is generally used to describe the relationship between the racial composition of a particular school and the racial composition of the system as a whole. The Supreme Court's decision in *Green* requires school boards to prove that racially identifiable schools are not the consequence of past or present discriminatory state action. Throughout this litigation, the parties have been unable to agree on a definition of a racially identifiable school. Nevertheless, Plaintiffs suggest a definition of a racially identifiable school as: a school having a population of black students of forty-percent (40%) or more.

Defendants argue that a working definition of a desegregated school is not required in order to determine whether unitary status has been achieved. Defendants emphasize that the Court provided numerical goals for the Defendants to consider as it aimed at desegregating schools.

However, a particular percentage has not been used as a line of demarcation. For example, in the 1971 Order, the Court directed Defendants to concentrate on all schools in the county having at least a 50% black population. The Court further suggested that a white-black ratio of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation. 1971 Order at 43-44. Notwithstanding, Defendants stress that none of the Court's Orders have expressly or implicitly directed Defendants to maintain a particular student race ratio at any school, or to take any action in response to increased black enrollments in the schools.[7]

In the 1971 Order, the Court explained that the Hillsborough County school system was a segregated system. "As of October 24, 1969, 74% of the county's white students were in 70 white schools, whereas 65% of the black students were concentrated in 21 black schools." (1971 Order at 35). Moreover, the Court explained that, as of October 23, 1970, 46% of the school system's blacks were attending 15 black schools. "Although they comprised only 19% of the student population, 13,606, or 69%, were in 28 schools at ***1291** least 50% black. On the other hand, 69% of the white students--57,869 out of 83,474--attended 65 schools either all white or at least 95% white." *Id.*

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[7]Defendants' position is not entirely accurate. As discussed above, in 1974, the Court directed Defendants' attention to the schools with increasing black enrollments and ordered Defendants to submit a supplemental desegregation plan. Moreover, the 1991 Consent Order provided that any "modifications" in student assignment patterns resulting from demographic or other changes must be made with an eye towards minimizing, to the extent practicable, the number of schools which deviate from the system-wide student enrollment ratios. *See* (1991 Consent Order at 6).

After the Court entered the 1971 Order, 97% of Hillsborough County elementary school students attended racially balanced schools, according to Plaintiffs.[8] In comparison, Plaintiffs argue, only 69% of Hillsborough County elementary school students attended racially balanced schools in 1995. Moreover, Plaintiffs point out that, for all but two (2) years between 1971 and 1988, 90% of junior high school students attended racially balanced schools; however, as of 1995, the percentage has dropped to 75%.[9]

The Constitution does not require that every school in every community must always reflect the racial composition of the school system as a whole. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971). The Courts have consistently warned against the application of an inflexible standard of having "no majority of any minority" in a school.

> Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in absence of a showing that

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[8]Plaintiffs have used Dr. Shelley's definition of "racially unbalanced" schools, which includes schools with an African-American population 40% or above.

[9]Although Plaintiffs' statistics are significant, it should be noted that the October 1969, figures reflect the percentages of *white* and *black* students, whereas, Plaintiffs' figures represent the entire student population.

> either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary.

Id. at 31-32, 91 S. Ct. 1267. Accordingly, it is clear that Defendants had no continuing duty to maintain a particular black to white student ratio on a school-by-school basis over the expansive time period of this litigation, including the 80%/20% ideal set forth in the 1971 Order. *See id.* at 24, 91 S. Ct. 1267 (disapproving an approach to desegregate schools which requires, as a matter of constitutional right, any particular degree of racial balance or mixing).

Nevertheless, the district-wide ratios are an important starting point to analyze Defendants' fulfillment of its obligations. "In most cases where the issue is the degree of compliance with a school desegregation decree, a critical beginning point is the degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole." *Freeman*, 503 U.S. at 474, 112 S. Ct. 1430. Moreover, although schools which have become virtually all one-race "require close scrutiny," they are not *per se* unconstitutional. *Swann*, 402 U.S. at 26, 91 S. Ct. 1267. However, their existence in a school system with a history of *de jure* segregation, establishes a presumption that they exist as a result of discrimination and the burden of proof shifts to the School Board. *Id.* "The school district bears the burden of showing that any current [racial] imbalance is not traceable, in a proximate way, to the prior violation." *Freeman*, 503 U.S. at 494, 112 S. Ct. 1430.

The Court finds that Plaintiffs' definition of a racially identifiable school is useful and fair. A school that has 20%

more black students than that of the district-wide composition indicates that the school has deviated significantly from the system-wide norm. While the phrase "racially identifiable" is useful as a descriptive term, it should not be accorded more weight than it deserves.[10] A school system can have racially identifiable schools and still be a unitary school system. Moreover, if the racial identifiability is unrelated to *de jure* segregation, a court imposed remedy is not justified. However, the fact ***1292** that a school deviates from the system-wide ratio should, at least, cause some concern and an evaluation by the School Board (the authority charged with the responsibility to desegregate the schools to the maximum extent possible), must ensue.[11] In other words, while racial identifiability of a school is relevant, it does not define the standard for determining whether the School Board has discharged its affirmative duty or has achieved unitary status.

(ii) *Demographics*

Plaintiffs challenge the Magistrate Judge's evaluation of Defendants' evidence concerning the change in demographics in Hillsborough County. Plaintiffs argue that, not only is the change in demographics in Hillsborough County far less

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[10]The Court will use the phrases "racially identifiable" and "racially imbalanced" or "racially unbalanced" interchangeably to generically represent schools which are a source of concern.

[11]The Supreme Court has emphasized that, "the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools." *Swann*, 402 U.S. at 26, 91 S. Ct. 1267.

dramatic and more incremental than in Freeman, but the identification of pure demographic change is further complicated by the implementation of a Middle School Plan.[12] (Br. in Supp. of Pls.' Obj. to R & R at 15). Plaintiffs maintain that the Middle School Plan requires considerable change and that the statistical information on the precise demographic effect will not be discernible until the 2000 census is available. Moreover, Plaintiffs argue that Defendants have acted, or failed to act, in a number of ways which has contributed to the racial identifiability of the Hillsborough County schools. Plaintiffs assert that the issue is whether Defendants bear any responsibility for the racial identifiability and, if so, the extent to which Defendants are responsible.

As noted above, there are sixteen (16) schools which have become focal points for determining whether or not the school system is unitary.[13] The percentages of black students in each of these sixteen (16) schools, as of the 1972-73 school year, were as follows: Robles Elementary (24%), Edison Elementary (36%), Sulphur Springs Elementary (19%), Oak Park Elementary (23%), Graham Elementary (35%), Foster Elementary (21%), Cleveland Elementary (26%), Shaw Elementary (15%), Witter Elementary (18%), Cahoon Elementary (21%), Clair Mel Elementary (18%), West Tampa Elementary (14%), DeSoto Elementary (35%), Van Buren Junior High (17%), Sligh Junior High (20%), and Dowdell

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[12]In *Freeman*, the subject school system had 5.6% black students in 1969 and 47% black students by 1986. 503 U.S. at 475, 112 S. Ct. 1430. In the case at hand, the increase in black students ages 0 to 17 has only been from 17.4% in 1970, to 19.4% in 1990.

[13]The 16 schools represent the degree of racial imbalance in the school district, i.e., approximately 10% of the schools are racially identifiable. Notwithstanding, there are additional schools which are a source of concern, as discussed below.

Junior High (14%). (DX 7). In 1970, the total population in Hillsborough County was 490,265, of which, 422,119 were white and 66,648 (13.5%) were black. (DX 2 Table 1). During the same year, the total population between the ages of 0 to 17 years old was 164,278, of which, 135,344 were white, and 28,527 (17.4%) were black.[14]

However, the latest figures used in this litigation reflect the following percentages of black students attending the sixteen (16) schools, as of the 1995-1996 school year: Robles Elementary (90%), Edison Elementary (75%), Sulphur Springs Elementary (74%), Oak Park Elementary (70%), Graham Elementary (67%), Foster Elementary (61%), Cleveland Elementary (57%), Shaw Elementary (56%), Witter Elementary (54%), Cahoon Elementary (52%), Clair Mel Elementary (49%), West Tampa Elementary (47%), DeSoto Elementary (43%), Van Buren Junior High (53%), Sligh Junior High (50%), and Dowdell Junior High (49%). (DX 7). In 1990, the total population in Hillsborough County was 834,054, of which, 690, 352 were white and 110,283 (13.2%) were black. (DX 2 Table 1). During the same year, the total population between the ages of 0 to 17 years old was 202,274, of which, 152,900 were white, and 39,163 (19.4%) were black.[15]

***1293** Plaintiffs assert that, since 1971, there has been relatively little change in the racial composition of the Hillsborough County School District as a whole and by grade level, except at the high school level. (Pls. Proposed Findings of Fact and Conclusions of Law at 12). Plaintiffs contend that, while most schools in Hillsborough County reflect the district-

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[14]Less than 1% were classified as nonwhites.

[15]Approximately 5% of the "school-age" population was classified as nonwhites.

wide student racial composition, the schools with 40% or more black student populations should be considered racially identifiable because they are approximately 20 percentage points above the system-wide ratio. *Id.* Moreover, Plaintiffs point out that, the majority of these schools are 30 percentage points or more above the district-wide black student racial composition. *Id.*

Conversely, Defendants argue that the increase in the number of schools with a majority black student population is the result of residential patterns and not the product of discrimination by the School Board. Moreover, Defendants argue that Plaintiffs' insistence on the elimination of racially identifiable schools seeks to impose an obligation on Defendants which is not mandated by governing law. Defendants emphasize that the Court may only order the elimination of racially imbalanced schools when the racial imbalance was caused by an unlawful *de jure* policy of the school district.

Defendants' recitation of the law is correct. "Racial balance is not to be achieved for its own sake." *Freeman*, 503 U.S. at 494, 112 S. Ct. 1430. In *Freeman*, Supreme Court evaluated a district court's role in supervising a school system where demographics are the cause of racial imbalances and stated:

> Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated.

Freeman, 503 U.S. at 495, 112 S. Ct. 1430. Accordingly, in the case at hand, the issue is whether the racial imbalances in the school district have a causal link to the *de jure* violation being remedied.

The Court is not convinced that a shift in demographics and residential patterns explains the racial imbalance in the Hillsborough County School system. Defendants have failed to adequately discharge their affirmative duty to eliminate the dual system "root and branch." While the Court finds that the racial imbalances in the schools are not the result of a deliberate attempt by Defendants to fix or alter demographic patterns to affect the racial composition of the schools, Defendants' apathy over the years demonstrates a lack of good faith compliance.[16] Moreover, because Defendants failed to fully discharge their affirmative duty to desegregate the school system, the district has not been desegregated to the maximum extent practicable. Defendants have failed to prove that the racial imbalances are not traceable, in a proximate way, to the past *de jure* segregation.

B. Student Assignments

All of the schools in Hillsborough County were

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[16]After Defendants filed their 1974 Annual Report, which indicated that four (4) schools had become 40% black and one (1) school had become 50% black, the Court directed Defendants to file a supplemental plan designed to insure that "the requirements of the Court's previous orders insofar as they relate to Lee Elementary School[, which had become 50% black,] will be complied with as of the beginning of the 1975-76 school year." Order of January 14, 1975. In the same order, the Court directed the Defendants' attention to the other schools which had become 40% black. *Id.* Notably, this Court was expressing its concerns to Defendants only three (3) school years after implementation of the desegregation plan.

desegregated as of the 1971- 1972 school year. Furthermore, each of the sixteen (16) schools, which are currently considered racially imbalanced, was predominately white following the 1971 desegregation Order. (T1 at 33). Since that time, the School Board has implemented numerous attendance changes which altered the racial composition of the schools district-wide. However, these sixteen (16) schools have increased their black student populations relatively quickly after the 1972-1973 school year and their enrollments have become disproportionate to the system-wide race ratios. Although ***1294** Defendants used projected attendance figures to calculate the expected improvements to the race ratios of the schools, the Court will focus on the actual changes to evaluate the cause of the racial imbalance in the sixteen (16) schools.

(i) *Attendance Zone Adjustments*

Robles Elementary

The first boundary changes made to Robles' attendance zone took place during the 1976-1977 school year. The boundary change which affected first through fifth graders included transferring fifty-three (53) black and seventeen (17) white students from Robles Elementary to Browards Elementary. In addition, eight (8) black and three (3) white sixth graders were transferred to Potter Elementary. The actual racial composition of students in attendance for the 1975-1976 school year was 33% black and 67% white, whereas after the change was made, the actual racial composition of students in attendance for the 1976-1977 school year was 30% black and 70% white. Significantly, no other boundary changes were implemented that would have affected Robles' attendance zone. The actual racial composition of Robles for the 1995-1996 school year was 90% black and 10% white.

Cleveland Elementary

Defendants changed Cleveland's attendance area for the 1972-1973 school year to encompass a portion of Potter Elementary's attendance zone and the parameters of the attendance area were redrawn. The actual composition of students in attendance for the 1972-1973 school year was 26% black and 74% white. For the 1975-1976 school year, Defendants made boundary changes which affected first through fifth graders by adjusting the parameters of the attendance zone. All sixth grade students were moved to the Potter attendance zone. The actual racial composition of students in attendance for the 1974- 1975 school year was 46% black and 54% white, whereas after the changes were made, the actual racial composition of students in attendance for the 1975-1976 school year was 44% black and 56% white. For the 1989-1990 school year, 12 black and 12 white students were reassigned from Sulphur Springs Elementary to Cleveland and the parameters of Cleveland's attendance zone were readjusted. The actual racial composition of students in attendance for the 1988-1989 school year was 61% black and 39% white, whereas after the changes were made, the actual racial composition of students in attendance for the 1989-1990 school year was 53% black and 47% white. No other boundary changes were implemented that would have affected Cleveland's attendance zone. The actual racial composition of Cleveland for the 1995-1996 school year was 57% black and 43% white.

Edison Elementary

The actual racial composition of students in attendance for the 1972-1973 school year was 36% black and 64% white. The first boundary change affecting Edison's attendance zone was implemented for the 1982-1983 school year. Twenty-one (21) white and ninety-four (94) black students were transferred from Edison to Claywell Elementary. The actual racial

composition of students in attendance for the 1981-1982 school year was 55% black and 45% white, whereas after the change was made, the actual racial composition of students in attendance for the 1982-1983 school year was 50% black and 50% white. No other boundary changes were implemented that would have affected Edison's attendance zone. The actual racial composition of the students in attendance for the 1995-1996 school year was 75% black and 25% white.

Graham Elementary

The actual racial composition of the students in attendance for the 1972-1973 school year was 35% black and 65% white. The first boundary change affecting Graham's attendance zone was implemented for the 1988-1989 school year. Graham received thirteen (13) black first through sixth graders from the Gorrie satellite, pursuant to a student assignment change. The actual racial composition of students in attendance for the 1987-1988 school year was 63% black and 37% white, whereas after the change was made, the actual racial composition of the students in attendance for the 1988-1989 school year was 64% black and 36% white. No other boundary changes were implemented that would have affected Graham's attendance ***1295** zone. The actual racial composition of the students in attendance for the 1995-1996 school year was 67% black and 33% white.

Oak Park Elementary

The actual racial composition of the students in attendance for the 1972-1973 school year was 23% black and 77% white. The first boundary change affecting Oak Park's attendance zone was implemented for the 1979-1980 school year. During the 1979-1980 school year, there was a satellite transfer made from Oak Park to DeSoto Elementary and there was a satellite transfer from Gary to Oak Park Elementary.

These satellite transfers were implemented in order to close Gary Elementary. The actual racial composition of students in attendance for the 1978-1979 school year was 46% black and 54% white, whereas after the change was made, the actual racial composition of the students in attendance for the 1979-1980 school year was 41% black and 59% white. During the 1996-1997 school year, one (1) white and ten (10) black first through fifth graders were transferred from Oak Park to Alafia Elementary School as the result of a needed cluster adjustment. The actual racial composition of the students in attendance for the 1996-1997 school year was not available when Defendants submitted their materials. The actual racial composition of the students in attendance for the 1995-1996 school year was 70% black and 30% white.

Defendants do not dispute the fact that no boundary changes were specifically made to reduce the racial imbalance. Instead, Defendants attribute the increase in the black student populations at the sixteen (16) schools to demographic changes in attendance zones and contend that, as a result, no changes were required. For example, Defendants argue that the percentage of black school-age children living in the Robles attendance zone increased from 13% in 1970 to 31.3% in 1980.[17] Defendants argue that the Robles attendance zone subsequently experienced a drastic increase in the percentage of black school-age children from 31.3% in 1980 to 71.4% in 1990. Census data is unavailable for changes occurring after 1990. Notwithstanding, Defendants assert that when they have made changes to the attendance patterns for reasons other than race, the racial composition of the schools was a paramount consideration.

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[17]The phrase "school-age children" includes children 0 to 17 years old.

Conversely, Plaintiffs maintain that there has been relatively little change in the racial composition of the Hillsborough County school district as a whole since 1971. Plaintiffs argue that during the period when the number of racially identifiable schools increased, Defendants opened and closed schools which created new attendance zones. Plaintiffs contend that, when the initial decisions were made, for example, to construct a new school, the principal concern should have been desegregation; the problems of overcrowding could have been adjusted accordingly. Plaintiffs argue that Defendants' obligations include, *inter alia,* considering the construction and abandonment of school facilities, and drawing attendance zones so as to affirmatively promote desegregation of the school system. Plaintiffs argue that mere neutrality is not an option.

In addition, Plaintiffs assert that over the course of this litigation, Defendants altered existing attendance zones and redeployed inner-city satellite zones from school to school. Consequently, Plaintiffs argue, Defendants were provided with an opportunity to address existing racial identifiability in the school system; however, Defendants failed to take advantage of those opportunities. Furthermore, Plaintiffs emphasize that the attendance zones were changed infrequently for the schools which are now racially identifiable; therefore, Defendants' failure to act has contributed to this racial imbalance in the schools. Moreover, Plaintiffs argue that, other techniques used to improve the racial compositions at schools in Hillsborough County, such as the assignment and reassignment of satellite zones, were not used to reduce the percentages of black students at schools such as Robles. As a result, Plaintiffs assert that this Court must determine whether Defendants have been affirmatively seeking to integrate the Hillsborough County school system with respect to all of the factors outlined in *Green*, from 1971 until the present.

***1296** Undoubtedly, Defendants have been effective in desegregating the Hillsborough County school system. Hillsborough County is the 12th largest school district in the country. For the 1996-1997 school year, the county consisted of 149 public schools. Defendants point out that a majority of the schools have remained within a plus or minus 10% variance from the 80/20 race ratio suggested as ideal by the Court in 1971.[18] *See* 6th Annual Report at 42. Moreover, Defendants argue that, although the modifications have been made for reasons other than race, Defendants had no obligation to improve racial balances if the imbalances were not caused by either prior or present action of the School Board.

Defendants assert that, upon implementing their desegregation plan, none of the schools in Hillsborough County had a black majority population for the 1971-1972 school year.[19] Defendants point out that, although a few elementary schools began to increase their black population in the following years, the School Board implemented a supplemental plan with the Court's approval.[20] By the end of 1974, no

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[18]The 6th Annual Report submitted by Defendants provides the following statistics for the 1996-1997 school term: 18 schools had lower than 10% black student population; 30 schools had between 10-15% black student population; 46 schools had between 16-24% black student population; 18 schools had between 25-30% black student population; 14 schools had between 30-39% black student population; 9 schools had between 40-49% black student population; 14 schools had 50% or higher black student population.

[19]As of October 27, 1971, there were no majority black schools among the 122 schools in the district and only one (1) school had more than a 40% black student population. (DX 7).

[20]It should be noted that the supplemental plan was developed at the Court's insistence.

schools had a black majority population.[21] Defendants argue that, from that point forward, the School Board has endeavored to maintain a desegregated school system in Hillsborough County. Defendants argue that, Plaintiffs' demand that: "all racially identifiable schools be eliminated," is contrary to the mandates of the Constitution. Defendants argue that they are not required to maintain a specific ratio at each school in the County.

Defendants admit that the schools which are now majority black schools and which are the focus of the Plaintiffs' Motion to Enforce Order, have steadily increased their black population over the course of this litigation; however, Defendants attribute this increase to the change in demographics, rather than, any action or inaction by the School Board.[22] Consequently, Defendants argue that they were not required to take affirmative action. Defendants contend that the only issue is whether the racial imbalances are traceable to the prior violation.

Defendants' Expert

During the 1996 unitary status hearing, Defendants' expert, Dr. Clark, testified about the differences in growth rates between the black and white populations of children 0 to 17 years old. Dr. Clark noted that, between 1970 and 1980, the white 0 to 17 population grew by under 3% while the black 0 to

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[21]The 1975 Annual Report reflects that five (5) schools out of 128 had student populations which were in excess of 40% black. However, by the 1975-76 school year, one (1) school, Cleveland Elementary, had become a black majority school at 55%.

[22]Using Robles Elementary as an example, the school was 43% black in 1979-80; 75% black in 1984-85; 80% black in 1986-87; 85% black in 1990-91; and 90% black in 1993. *See* (DX 7).

17 population grew by almost 16%, five times as fast. (T2 at 20). From 1980 to 1990, the growth of the black population was almost twice as fast as the growth of the white population. *Id.* Dr. Clark explained that the growth in both segments of the population, as a whole, makes it possible to keep racial balance within a reasonable boundary. *Id.* However, according to Dr. Clark, the differential growth rate of the black 0 to 17 population indicates that the black school-age population was increasing proportionately faster, making it more difficult to keep the schools racially balanced. *Id.* at 21.

Significantly, Dr. Clark testified that changes in the populations did not occur uniformly across the county. Dr. Clark explained that Hillsborough County experienced a significant loss of white population ***1297** and a significant gain of black population in the inner-city area. *Id.* at 25. Therefore, according to Dr. Clark, any schools within the inner-city areas that are neighborhood schools, will reflect racial compositions similar to that of the composition of the inner-city areas. Dr. Clark testified that in 1970, there were about six (6) or seven (7) census tracts that had a 95% black 0 to 17 age population, whereas, in 1990, there were only three (3) census tracts with a 95% black 0 to 17 age population. *Id.* at 33. Nevertheless, Dr. Clark emphasized that the tracts with a 50% black 0 to 17 age population increased by about 40% between 1970 and 1990. *Id.* at 33-34.

Dr. Clark testified that, the shifts in the inner-city populations made it very difficult to adjust attendance boundaries to maintain a student body composition within a plus or minus 20% range of the district-wide ratios. *Id.* at 35. Dr. Clark explained that, as the areas with a 50% black 0 to 17 age population expand, as it has done in the inner-city of Hillsborough County, each school within those areas is impacted. *Id.* According to Dr. Clark, as the School Board attempts to make adjustments to the schools within the areas

with a 50% or greater black population, and because these areas have expanded to encompass many different school attendance zones, each adjustment makes it increasingly difficult for the School Board to make additional adjustments that will effectively improve the race ratios in the other schools in those areas. *Id.* Defendants' Exhibit 8 geographically depicts the attendance zones of the racially imbalanced schools and clearly demonstrates that the schools which have become racially identifiable are located in the same vicinity as other schools with high black enrollments. Although there are additional adjustments which can be made to improve racial balance, the improvement would be at the expense of neighboring schools which are on the verge of becoming racially identifiable.

Dr. Clark analyzed fourteen (14) of the sixteen (16) schools which are racially imbalanced and grouped Robles, Cleveland, Edison, Oak Park, and Graham together because these schools became at least 40% black between 1970 and 1980. (Tr 2 at 36). The remaining schools were grouped because those schools deviated from the plus or minus 20% range between 1980 and 1990.

In 1970, the Robles attendance zone was comprised of 2,247 children between the ages of 0 to 17. (DX 2 Table 4). Only 292(13%) of those children were black. *Id.* In 1980, the Robles attendance zone was comprised of 2,496 children between the ages of 0 to 17. *Id.* During this time, 781 (31.3%) of those children were black. *Id.* Significantly, by 1990, the Robles attendance zone was comprised of 2,875 children between the ages of 0 to 17, by this time, 2054 (71.4%) of those children were black. *Id.* Dr. Clark emphasized that, while the total population of an area was not experiencing dramatic increases, the black population of school-aged children was increasing dramatically. Dr. Clark also pointed out that the satellite zone originally assigned to Robles was only 0 to 5% black school-aged children. However, in 1990, the satellite

area, although no longer maintained, was almost entirely 75-95% black school-aged children and would have further increased the proportion of black students enrolled at Robles if it had not been removed. (T2 at 46); (DX 2 Table 4; Figure 10).

In 1970, Cleveland's attendance zone was comprised of 1,657 children ages 0 to 17. (DX 2 Table 4). During this time, only 46 (2.8%) of these school-aged children were black. *Id.* In 1980, the number of school-aged children in the attendance zone decreased to 1,544; however, by this time, 639 (41.3%) of the school-aged children were black. *Id.* In 1990, the number of school-aged children in Cleveland's attendance zone increased slightly to 1,578, and the black school-aged population increased to 654 (41.4%). *Id.* Dr. Clark explained that in 1970, there were a few blocks with in Cleveland's attendance zone that were between 0 and 5% and a few blocks that were comprised of between 5 and 25% black school-aged children. (Tr 2 at 40). By 1980, the black school-aged population was still concentrated in the same few blocks; however, by this time, those blocks were comprised of between 75 to 95% black school- aged children. *Id.* at 41. In 1990, those few blocks were not as concentrated with a black school-
***1298** aged population; however, the population spread out through a large number of blocks which were primarily 50 to 75% black 0 to 17 year old children. Moreover, black school-aged children made up of 95 to 100% of some of the neighborhood blocks closest to the school. *Id.*; (DX2 Figure 6).

Dr. Clark's testimony and report on the Demographic Change and School District Impacts in Hillsborough County (DX 2) highlights the changes in the attendance zones for the racially imbalanced schools. Dr. Clark described the increases in the black school-aged children in the attendance zones and concluded that the shift in the residential patterns in the inner-city of Hillsborough County accounts for the racial imbalances

in these schools. Notwithstanding, the Court is compelled to question the reliability of Dr. Clark's statistics.

There are significant problems with the statistics used to explain the racial imbalances in the sixteen (16) schools under consideration. Defendants' statistics encompass a larger segment of the population than is useful to explain the deviations in the racial compositions of the unbalanced schools. Specifically, Defendants rely on Dr. Clark's use of school-aged children from ages 0-17 to explain enrollment ratios at the elementary schools; however, almost one-half of the children included in this group would not, in fact, be attending an elementary school.[23] Moreover, while a few blocks in an attendance zone may reflect black school-age populations as high as 95%, those few blocks only represent a small proportion of the entire attendance zone. Finally, Dr. Clark's analysis does not address Defendants' initial decisions to draw attendance zones, decisions not to act when it was apparent that those zones were inappropriate, or other School Board decisions, such as, location of new schools, or implementation (or lack thereof) of desegregation tools.

(ii) *Inflated Statistics*

The sweeping nature of Defendants' statistics is of particular concern. Dr. Clark's testimony placed great emphasis on the increase in the percentage of neighborhood blocks which were comprised of a high concentration of black school-aged children within each of the schools' attendance zones.

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[23]The Court acknowledges that more precise figures were not available; however, the fact that the 0 to 17 age group logically encompasses children too young and too old to attend elementary schools, counsels against placing great weight on the use of these statistics.

However, these statistics alone fail to adequately explain the racial compositions in these schools. For example, if the attendance zone is made up of fifty (50) neighborhood blocks, and three (3) of those blocks are 95 to 100% black, this still represents a small number of black students within the attendance zone. Moreover, while a certain block may have been as high as 100% black, that block may have only had four (4) school-aged children living on that block. To intensify the problem, three (3) of those children may have been high school, rather than, elementary school-aged children. While the shortcomings of Defendants statistics do not evidence deliberate discriminatory action, Defendants "bear[ ] the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation." *Freeman*, 503 U.S. at 494, 112 S. Ct. 1430. Therefore, even though Defendants' statistics may look significant at first glance, the Court is concerned about the reliability of those numbers.

A very real example is Dr. Clark's testimony regarding Cleveland Elementary. Dr. Clark pointed out that, in 1970, a few blocks in the attendance zone were comprised of between 5 and 25% black students aged 0 to 17. The black enrollment at Cleveland was around 20% in 1971. Significantly, over the next couple of years, Cleveland's black enrollment soared up to 40% and then, after a few more years, to 60%. (T2 at 40); (DX 2 Figure 6). Dr. Clark testified that, in 1970, there were a few blocks in Cleveland's attendance zone which were between 0 and 5% black and a few blocks which were between 5 and 25% black. To explain the correlation between the black populations in these neighborhood blocks and the black enrollment at Cleveland Elementary, Dr. Clark testified that, "[s]o that's–we would expect, then, that--if those children are going to the school there, we would expect the school to be somewhat in that range, and indeed it is. That's about what the percentage of black ***1299** enrollment is, and we're seeing it in the school." (T2 at 41). In other words, Dr. Clark concluded that, because

there were a few neighborhood blocks in Cleveland's attendance zone that were as concentrated as 25% black, it explains why the black enrollment at Cleveland Elementary was around 20% in 1971 and then continued to climb as the concentration in the blocks increased. Interestingly, the *entire* attendance zone was comprised of only 46 (2.8%) black school-aged children during this time.

A cursory inspection of Dr. Clark's graphical representation of these figures, reveals that these blocks with a high concentration of black school-aged students, represent a small portion of the entire attendance zone.[24] *See* (DX2 Figure 6). Moreover, Dr. Clark qualified his answer by saying, "if those children are going to the school there." However, in all likelihood, there would be several children who are outside of the *elementary school* age group; therefore, they would not, in fact, be attending that school. The fact that a small portion of

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[24]While there has been no representation that the graphical representations have been drawn to scale, the numbers behind the graphics produce the same conclusion. For instance, Defendant's Exhibit 2, Figure 6, graphically represents that there are a few blocks within Cleveland's attendance zone that are comprised of between 5 to 25% black school-aged children. However, in sheer numbers, there were only 46 (2.8%) black school-aged children, out of 1,657 school-aged children, in Cleveland's entire attendance zone. Of course, some of those children were not attending the elementary school because the data encompasses 0 to 17 year olds. Although Dr. Clark testified that the 20% black population at Cleveland during the 1971-1972 school year was expected, it would appear that a 2.8% black student population would have been more fitting. Moreover, the fact that statistics have not been provided regarding the concentration of white school-aged children in the neighborhood blocks within an attendance zone, to compare to the concentration of black school- aged children, creates additional doubt as to the reliability of Defendants' statistical arguments.

the attendance zone has a high percentage of minority school-aged children does not explain why the *total black enrollment* of those elementary schools correlates to those few blocks with high percentages of minorities; especially since a percentage of those children in the attendance zone would not be attending the school in question.[25] Furthermore, it should have been quite easy for Defendants to make adjustments to combat the sudden increases in minority enrollment if the increases resulted from a few concentrated blocks within the attendance area.[26]

Granted, in 1990, the percentage of black school-aged children in Cleveland's attendance zone had increased dramatically and the number of blocks with a majority of black school-aged children has increased; however, the same deficiencies are present in Dr. Clark's analysis and twenty (20) years had passed since Defendants received the directive to desegregate the Hillsborough County school system. These findings weigh heavily against Defendants' assertion that they responded affirmatively to the Court's desegregation mandates.

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[25]The Court is constrained to interpret Defendants' data to represent small percentages of the attendance zones in question. Because there are no statistics available to the Court which denote the number of children represented by these neighborhood blocks or the number of *elementary*-aged school children within each elementary school attendance zone, it is difficult to accurately speak in terms of small or large percentages of these attendance zones.

[26]The key question is whether Defendants were required to take steps to combat those increases after a racially neutral system of student assignment had been established. While the failure to make additional adjustments may not evidence deliberate racial discrimination, Defendants' failure to take "whatever steps necessary" is relevant to Defendants' good faith compliance, which will be discussed below.

The racial composition at Robles is also illustrative of the deficiencies in Dr. Clark's explanation. For instance, in 1970, Robles' entire attendance zone was comprised of 2,247 children ages 0 to 17. During this time, only 292(13%) of these 0 to 17 year old children were black. However, the black enrollment at Robles Elementary in the early 1970's rose from around 20% to 30%. In 1980, the number of school-aged children in the attendance zone increased to 2,496. By this time, 781 (31.3%) of the school-aged children were black. However, black enrollment at Robles in the early 1980's was between 50 and 60%, and climbing. In 1990, the number of school-aged children in Robles' attendance zone increased to 2,875, and the black school- ***1300** aged population increased to 2054 (71.4%). However, black enrollment at Robles was over 80% black in 1990 and was approaching 90%.

Certainly, the significant increase in black school-aged children residing in Robles' attendance zone over the course of this litigation explains why the black enrollment in that school continued to increase. However, even if the Court were able to ignore the deficiencies in Dr. Clark's statistics which he used to explain the increase in black students at the elementary school level, the abiding question is: why wasn't the attendance zone adjusted, at least, initially?[27] Although Dr. Clark testified that various neighborhood blocks within the attendance zone had high percentages of black school-aged students, Defendants have not provided the Court with information on how many of those students actually attended elementary school. Significantly, in 1980, black school-aged students comprised only 31.3% of Robles' *entire* attendance zone; however, the *actual* enrollment at Robles during the 1980-1981 school year

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[27]By 1975 five (5) schools out of 128 had black enrollments of 40% or more: Cleveland, Edison, Gary, Graham, and Palm River Elementary.

was 51% black. Notably, Defendants took no affirmative steps to address the fact that Robles had now crossed the 50% mark and no longer reflected the ideal composition suggested by the Court. Especially since the *entire* attendance zone was only 31.3% black and the *elementary school* was already 51% black.

Plaintiffs' Expert

Plaintiffs' expert, Dr. Shelley, studied the disparities between the percentage of black children 0 to 17 years old and the actual black enrollment in the five (5) schools which became racially unbalanced in the 1970s. Dr. Shelley subtracted the percentage of black children 0 to 17 years old living in a particular attendance zone from the percentage of black children actually attending the elementary school in that zone. (T4 at 51). For example, in 1970 Cleveland Elementary's attendance zone was comprised of 2.8% black children, but the actual attendance at Cleveland for the 1971-1972 school year was 18% black. Thus, Dr. Shelley testified that the difference between these two percentages represents a disparity of approximately 15%. During the 1971- 1972 school year, the disparities were as follows: Cleveland (15%), Edison (17%) Graham (10%), Oak Park (15%), and Robles (12%). In 1980, the disparities among these same schools were as follows: Cleveland (24%), Edison (14%) Graham (17%), Oak Park (4%), and Robles (20%). Finally, the disparities in 1990 were: Cleveland (13%), Edison (-2%) Graham (28%), Oak Park (4%), and Robles (14%). (PX2 Table 5).

Dr. Shelley testified that if natural demographic change was the cause of the racial imbalance in these schools, it would be reasonable to expect that the disparities would be consistent at these schools. (T4 at 53). In other words, if the natural demographic changes were the only cause of imbalance in these schools, the amount that the *actual* attendance of black students exceeds the *total* number of black children in each attendance

zone would be fairly consistent from one school to another. *Id.* at 56. Dr. Shelley explained that if demographic change is the cause of these imbalances, then "there is no reason to believe that the demographic factors such as birth rates are likely to differ substantially from one attendance area to another." *Id.* at 57. Moreover, Dr. Shelley noted, "[w]ithout evidence that there's a substantial disparity between these school attendance areas in terms of things like birth rates, we would expect there to be a consistent pattern of difference between the school attendance areas among these identifiable schools." *Id.*

Dr. Shelley testified that the degree of disparity during the 1971-1972 school year was relatively small. *Id* at 58. The range was from Graham with 10% to Edison with 17%. Dr. Shelley explained that this 7% difference was the degree of consistency that he expected, because it should have been, and remained, consistently small. *Id.* Notably, this was only one (1) year after the desegregation Order was issued, and, undoubtedly, the best year, in terms of desegregation, for the Hillsborough County school ***1301** system with regards to student assignments. However, by 1980, the disparity increased to a range of 4% (Oak Park) to 24% (Cleveland). *Id.* By 1990, the disparity increased from -2% (Edison) to 28% (Graham). *Id.* Dr. Shelley testified that, unless the rates for births, deaths, migration, and other factors increased dramatically by attendance zone, there should not have been a dramatic increase in these disparities. *Id.* Although Defendants provided evidence that birth rates among African-Americans had increased disproportionately to those of whites, according to Dr. Shelley, the increase should have still produced consistent results among all African-Americans in these attendance zones.

Unfortunately, Defendants have taken the position that they were not required to make any adjustments if the School Board had not caused the racial imbalance. While this may be an appropriate legal argument to advance in unitary status

proceedings in 1996, it appears as though Defendants imprudently incorporated this argument into their policy making since the 1970's. However, a party to a court order or decree must abide by its terms until it is later declared improper or unconstitutional. Defendants have always been charged with the obligation to eliminate the vestiges of past discrimination to the maximum extent practicable. *See Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33, 37, 91 S. Ct. 1289, 28 L. Ed. 2d 577 (1971) ("Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.") (emphasis added); *Green v. County School Bd. of New Kent Co.*, 391 U.S. 430, 437-38, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968) ("School boards . . . operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.") (emphasis added). Furthermore, the Supreme Court has stated that, "[t]he remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971). However, since the 1970s, Defendants have taken the position that they were not obligated to take additional steps in certain circumstances. In other words, the School Board unilaterally determined that they were not responsible for the racial imbalances; therefore, there was no need to take affirmative steps.

Although Defendants did not continue to employ aggressive desegregative techniques once the race ratios reflected the district-wide ratio, Defendants continued to

"consider" the racial compositions of the schools as decisions were made. However, despite the fact that Defendants may have been successful in desegregating the school system, they are obligated to make affirmative efforts to desegregate until unitary status is declared. With regards to student assignments, affirmative efforts would have included reassigning students, rezoning, marketing the majority to minority programs, etc. The Court acknowledges that Defendants have made affirmative efforts to a limited extent; however, Defendants' failure to adequately address the racial imbalances which developed in the elementary schools relatively soon after the desegregation plan was implemented, does not exhibit a good faith commitment to desegregation.[28] In other words, regardless of the cause of the imbalances, until Defendants sought a determination through the proper judicial channels, they were obligated to address these racial imbalances pursuant to the Court's orders. Moreover, the fact that a school system resists resegregation fortuitously, does not demonstrate good faith compliance with the Court's orders.

Without reiterating all of the abovementioned concerns for Edison, Graham, and Oak Park, the Court will merely emphasize the ***1302** statistics the Court finds important. In 1970, Edison had 1,788 school-aged children in its attendance zone, 343 (19.2%) were black. The actual racial composition for the 1972-1973 school year was 36% black and 64% white. By 1980, 584 (39.9%) of the 1,463 total school-aged students in Edison's attendance zone were black. The actual racial composition for the 1980-1981 school year was 55% black and 45% white. By 1990, Edison's attendance zone included 836

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[28]Unfortunately, Defendants may have been misled by the content of an *ex parte* communication conducted with the Judge and his staff who previously presided over this case. This matter will be discussed below.

school-age students, 590 (70.5%) were black. The actual racial composition of students in attendance for the 1990-1991 school year was 69% black and 31% white.

In 1970, Graham had 1,687 school-aged children in its attendance zone, 374 (22.2%) were black. The actual racial composition for the 1972-1973 school year was 35% black and 65% white. By 1980, 462 (35.9%) of the 1,288 total school-aged students in Graham's attendance zone were black. However, the actual racial composition for the 1980-1981 school year was already 52% black and 48% white. By 1990, Graham's attendance zone included 1,220 school-age students and 523 (42.9%) were black. The actual racial composition of students in attendance for the 1990-1991 school year was 68% black and 32% white.

In 1970, Oak Park had 1,649 school-aged children in its attendance zone, but only 117 (7.1%) children were black. The actual racial composition for the 1972-1973 school year was 23% black, more than three (3) times the total number of black children 0 to 17 years old in Oak Park's attendance zone. By 1980, 664(39%) of the 1,703 total school-aged students in Oak Park's attendance zone were black. The actual racial composition for the 1980-1981 school year was 43% black and 57% white. By 1990, Oak Park's attendance zone included 1,580 school age students and 897 (56.8%) were black. The actual racial composition of students in attendance for the 1990-1991 school year was 61% black and 38% white.

As discussed above, the percentages of school-aged children in an elementary school's attendance zone, naturally, overstated the actual percentages of students who were elementary school-age students. Notwithstanding, the actual black enrollment at the five (5) elementary schools discussed above almost exclusively exceeded the total number of school-aged students in the entire attendance zone. Since the *total*

number of school-aged students in the attendance zones was an overstatement of *actual* attendees at the elementary schools at issue, and because the percentage of black school children actually attending each school almost always exceeded the "overstated" percentages, the Court is hesitant to accept Defendants' argument that a shift in demography is the sole cause the imbalance in these elementary schools.[29] Moreover, Plaintiffs have provided evidence that the discrepancies were not caused solely by a shift in demography. Defendants' failure to act affirmatively in light of these deviations necessitates continued supervision.

Interestingly, the parties focus almost exclusively on these sixteen (16) schools which have high percentages of black students in attendance. However, there is a significant number of other schools in which the racial compositions are disproportionate with the system-wide ratio. The fact that Plaintiffs failed to make much of this point is of no concern for the Court. The school system must be evaluated as a whole. In 1971, the Court expressed, in great detail, its concerns for all segregated schools. While the focus thus far has been on schools which have become racially identifiable as "black schools," the fact that there are numerous other schools which are virtually all "white" schools is equally concerning. The Court is concerned with every school which is becoming a one-race school. Although a school which is 90% white only

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[29]While Defendants point to other variables such as majority black satellite zones which may have contributed to these discrepancies, the point is that Defendants made the decision to select and implement these satellite zones without taking "whatever steps might be necessary" and without making "every effort" to achieve the greatest possible degree of actual desegregation, to the extent practicable.

deviates approximately 10% from the district-wide ratio, it is also only 10% from becoming an absolute one-race school.

In the May 11, 1971, Order, this Court explained that, "[i]t was the Supreme Court's ***1303** view that while the existence of a small number of one-race schools is not a sure mark of a segregated system, in systems with a history of discrimination there is 'a presumption against schools that are substantially disproportionate in their racial composition.'" (1971 Order at 32) (quoting *Swann*, 402 U.S. at 26, 91 S. Ct. 1267). The Court also noted that of the seventy-nine (79) schools which the State Department of Education listed as white in a 1956 survey, in 1971, thirty-eight (38) were all or at least 95% white. *Id.* at 36, 91 S. Ct. 1267. According to Defendants' Exhibit 7, on October 24, 1994, there were eighteen (18) schools which were 90% or more white. Five (5) of those schools were 93% or more white. (DX 7). By October 30, 1995, twenty-four (24) schools were 90% or more white. Eight (8) of those schools were 93% or more white. (DX 7). By October 30, 1996, there were still twenty-four (24) schools which were greater than 90% white. Significantly, three (3) elementary schools had become 99% white and one (1) had become 97% white. At the junior high level, one (1) school had become 96% white and one (1) school had become 95% white. Consequently, the existence of these virtually one-race schools reveals that there were additional opportunities for Defendants to demonstrate a good faith commitment to desegregation.

Although Dr. Clark's report and testimony encompasses a degree of unreliability, based on the totality of the evidence, a shift in demographics is a substantial cause of the racial identifiability in Hillsborough County's schools. Plaintiffs' expert agreed that demographics have played a significant role in Hillsborough County; however, he asserted that additional factors should be considered and that it is premature to attribute racial imbalance in the schools to natural demographic change

until the 2000 census is available. While the Court finds a lack of good faith commitment to desegregation by Defendants, the Court is not suggesting that all racial imbalance should, or could, have been eliminated. It is probable that these few schools would have become racially imbalanced regardless of Defendants' efforts. However, the degree and magnitude of the racial imbalance could have been lessened if Defendants had acted affirmatively over the last twenty-seven (27) years. Unfortunately, with the passage of time, the availability and effectiveness of remedies diminishes.[30]

The second group of schools studied by Dr. Clark included: Cahoon Elementary, Clair Mel Elementary, Foster Elementary, Shaw Elementary, Sulphur Springs Elementary, West Tampa Elementary, Witter Elementary, Dowdell Junior High, and Van Buren Junior High. These schools were grouped together because they deviated plus or minus 20% from the system-wide ratios between 1980 and 1990. (T2 at 36).

Cahoon Elementary[31]

In 1980, Cahoon's attendance zone was comprised of 1,882 children ages 0 to 17. During this time, 396(21%) of these school-aged children were black. During the 1979-1980 school year, Cahoon's actual racial composition was 28% black and 72% white. There was a boundary change implemented for the 1980-1981 school year which slightly reduced the

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[30]Defendants are not solely to blame for the long delay. Between 1975 and 1994, Plaintiffs failed to object or otherwise complain about the existence of racially unbalanced schools.

[31]The statistics used for these nine (9) schools were taken from DX 2, Table 5 and Appendix A to Defendants' Docket No. 796: *Boundary Changes, Race Ratios & Demographic Changes for the 14 Hillsborough County Schools with more than 40% Black Students.*

percentage of black school children to 27%. However, in the 1986-1987 school year, the boundary change implemented increased the percentage of black students to 38%, from 33% the previous school year. In 1990, the number of school-aged children in the attendance zone increased to 2,015; however, by this time, 677 (33.5%) of the school-aged children were black. The actual racial composition for the 1990- 1991 school year was 38% black and 62% white. During the 1991-1992 school year, the actual racial composition for Cahoon was 41% black and 59% white. The actual racial composition of students in attendance at Cahoon for the 1995- 1996 school year was 52% black and 48% white.

Clair Mel Elementary

In 1980, Clair Mel's attendance zone was comprised of 3,211 children ages 0 to 17. During this time, only 523 (16.3%) of these school-aged children were black. During the ***1304** 1979-1980 school year, Clair Mel's actual racial composition was 27% black and 73% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 35% black and 65% white. In 1990, the number of school-aged children in the attendance zone decreased to 2,832; however, by this time, 1,112 (55.1%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 41% black and 59% white. The actual racial composition of students in attendance at Clair Mel for the 1995-1996 school year was 49% black and 51% white.

Foster Elementary

In 1980, Foster's attendance zone was comprised of 1,397 children ages 0 to 17. During this time, 438 (31.3%) of these school-aged children were black. During the 1979-1980 school year, Foster's actual racial composition was 36% black and 64% white. During the 1984-1985 school year, a sixth

grade was added to Foster and one (1) white and fifty-two (52) black students were transferred from Foster to Lopez. In addition, Foster received fifty-four (54) white and twenty (20) black students from Orange Grove Elementary. Defendants assert that this transfer was implemented to accommodate the new sixth grade at Foster and to relieve the racial imbalances developing. During the 1984-1985 school year, the actual racial composition of students in attendance was 29% black and 71% white. In 1990, the number of school-aged children in the attendance zone decreased to 1,215; however, by this time, 637 (52.4%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 46% black and 54% white. The actual racial composition of students in attendance at Foster for the 1995-1996 school year was 61% black and 39% white.

Shaw Elementary

In 1980, Shaw's attendance zone was comprised of 2,330 children ages 0 to 17. During this time, only 312 (13.4%) of these school-aged children were black. During the 1979-1980 school year, Shaw's actual racial composition was 17% black and 83% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 31% black and 69% white. In 1990, the number of school-aged children in the attendance zone increased to 2,696; however, by this time, 911 (33.8%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 38% black and 62% white. The actual racial composition of students in attendance at Shaw for the 1995-1996 school year was 56% black and 44% white.

Sulphur Springs Elementary

In 1980, Sulphur Springs' attendance zone was comprised of 1,600 children ages 0 to 17. During this time,

only 242 (15.1%) of these school-aged children were black. During the 1979-1980 school year, Sulphur Springs' actual racial composition was 28% black and 72% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 44% black and 56% white. In 1990, the number of school-aged children in the attendance zone increased to 2,771; however, by this time, 1,431 (51.6%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 62% black and 38% white. The actual racial composition of students in attendance at Sulphur Springs for the 1995-1996 school year was 74% black and 26% white.

Witter Elementary

In 1980, Witter's attendance zone was comprised of 1,523 children ages 0 to 17. During this time, only 267 (17.5%) of these school-aged children were black. During the 1979-1980 school year, Witter's actual racial composition was 23% black and 77% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 32% black and 68% white. In 1990, the number of school-aged children in the attendance zone increased to 1,809; however, by this time, 743 (41.1%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 46% black and 54% white. The actual racial composition of students in attendance at Witter for the 1995-1996 school year was 54% black and 46% white.

West Tampa Junior High/ Elementary[32]

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[32]West Tampa started out as a junior high school in 1971; however, it became a sixth grade center in the 1979-1980 school year. It was subsequently converted to an elementary school in 1986.

In 1980, West Tampa's attendance zone was comprised of 1,465 children ages 0 to 17. ***1305** During this time, only 305 (20.8%) of these school-aged children were black. During the 1979-1980 school year, West Tampa's actual racial composition was 21% black and 79% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 20% black and 80% white. For the 1986-1987 school year, West Tampa began serving grades K through 6. Defendants were required to implement numerous adjustments to complete this conversion. The actual racial composition of students in attendance at the "old" West Tampa Middle School before these changes were made was 25% black and 75% white. After these changes were made, the actual composition of students at the "new" West Tampa Elementary School for the 1987- 1988 school year was 47% black and 53% white. For the 1988-1989 school year, twenty (20) white sixth graders were transferred from Lockhart to West Tampa which lowered the percentage of black students to 42%. In 1990, the number of school-aged children in the attendance zone decreased to 1,379; however, by this time, 436 (31.6%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 44% black and 56% white. The actual racial composition of students in attendance at West Tampa for the 1995-1996 school year was 47% black and 53% white.

Dowdell Junior High School

In 1980, Dowdell's attendance zone was comprised of 7,494 children ages 0 to 17. During this time, 2,070 (27.6%) of these school-aged children were black. During the 1979-1980 school year, Dowdell's actual racial composition was 22% black and 78% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 37% black and 63% white. In 1990, the number of school-aged children in the attendance zone increased to 6,572; however, by this time, 2584 (39.3%) of the school-aged children were black. The actual

racial composition for the 1990-1991 school year was 41% black and 59% white. The actual racial composition of students in attendance at Dowdell for the 1995-1996 school year was 49% black and 51% white.

Van Buren Junior High School

In 1980, Van Buren's attendance zone was comprised of 10,998 children ages 0 to 17. During this time, only 1, 613 (14.7%) of these school-aged children were black. During the 1979-1980 school year, Van Buren's actual racial composition was 28% black and 72% white. During the 1985-1986 school year, the actual racial composition of students in attendance was 30% black and 70% white. In 1990, the number of school-aged children in the attendance zone increased to 12,583; however, by this time, 4983 (39.6%) of the school-aged children were black. The actual racial composition for the 1990-1991 school year was 42% black and 58% white. The actual racial composition of students in attendance at Van Buren for the 1995-1996 school year was 53% black and 47% white.

A study of the nine (9) schools which became more than 40% black in the second decade since the desegregation Order was issued reveals that the disparities between the percentages of black school-aged children in the attendance zones and the actual enrollment of black students are not as dramatic as the five (5) schools which became 40% black within the first decade. Nevertheless, the actual percentages of black students attending these nine (9) schools exceeded the total number of black children 0 to 17 years old in the attendance zones in virtually every instance. However, as discussed above, the failure to actively address these imbalances is more relevant to Defendants' good faith compliance with the Court's orders, rather than to the issue of whether Defendants currently have desegregated student assignments. Importantly, the fact that these schools did not become racially unbalanced until the

1980s provides support for Defendants' contention that gradual expansion of the black school-aged population caused the racial imbalance in these schools. "As the de jure violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior de jure system." ***1306** *Freeman v. Pitts*, 503 U.S. 467, 496, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992). However, the *Freeman* Court noted that, "[t]he causal link between current conditions and the prior violation is even more attenuated if the district has demonstrated its good faith." *Id.*

Defendant's other expert, Dr. Armor, testified about student race ratios within Hillsborough County. In addition, Dr. Armor summarized his findings in a report which was admitted into evidence as Defendants' Exhibit 1. Similar to the Court's definition of racially identifiable, Dr. Armor defined "racially balanced" schools as those schools that are within a plus or minus 20% variance from the district-wide racial composition. (DX 1 at 5). Dr. Armor indicated that prior to the Court's 1971 Order, only 12% of black students and 56% of white students attended racially balanced elementary schools. (DX 1 App. 1). During the first three (3) years of Defendants' desegregation efforts, 97 to 98% of black students and 99% of white students were in racially balanced schools. (T3 at 23). The percentage of white students that attended racially balanced schools remained above 90% through 1995, with the lowest percentage being 92%. (DX 1 App. 1). The percentage of black students attending racially balanced schools remained above 80% until 1989, was between 77% and 79% from 1989 through 1991, and since then, has remained around 70%. *Id.* Dr. Armor noted that "Hillsborough County has had a greater percentage of elementary students in racially balanced schools, and for longer durations, than any other districts I have evaluated in the Eleventh Circuit: DeKalb County, Savannah, and Muscogee County, Georgia." (DX1 at 5).

With regards to the junior and senior high schools, Dr. Armor reported:

> Charts 2 and 3 [which are appended to the report] show the percentage of junior and senior high students in racially balanced schools. Again, only 31 percent of black junior high and 54 percent of black senior high students were in racially balanced schools in 1970 before the court-ordered plan. Between 1971 and the mid-1980s, however, the rate reaches 100% in most years. Over 80 percent of black junior high students were in racially balanced schools until 1993, and all of the high schools have been balanced for the past three years. These rates for secondary schools are better than or comparable to other unitary school districts I have studies (sic).

(DX 1 at 6). In 1994, 79% of the black junior high school students attended racially balanced schools and in 1995, the percentages dropped to 75%. *Id.* From 1993 through 1995, 100% of the high schools were racially balanced.

Dr. Armor also testified about the dissimilarity and exposure indices for schools in Hillsborough County. A dissimilarity index is a statistical measure of the degree of racial balance. On a scale from zero (0) to one hundred (100), zero (0) represents perfect racial balance, i.e., a racial balance equal to the district-wide composition, and one hundred (100) represents a system with all one-race schools. (T3 at 27). Dr. Armor explained that the numbers in between correspond to the approximate proportion of students (both races) that would have to change schools in order to achieve a perfect racial balance, i.e., 23% black and 77% white. *Id.* According to Dr. Armor, any number below 30 indicates a very high degree of racial balance. *Id.*

On the other hand, the exposure index is the average percentage of white students in schools attended by black students. *Id.* at 29. Dr. Armor explained that it can be thought of as being a measure of the potential racial contact that black students experience in Hillsborough County. *Id.* Dr. Amor reported that:

> In 1970, the dissimilarity index is very high at 83, which is about average for southern schools districts at that time. The index drops below 20 between 1971 to 1973, which is about as low as it gets in large districts. The index increases gradually over the next twenty years, but it remains below 30 until 1991. For comparison purposes, the average dissimilarity index for large southern districts with mandatory desegregation plans was about 35 during the 1980s.
>
> The exposure index remains within ten points of its maximum value until the mid-1980s, but even at the present time it is 63, ***1307** which means that the average black student attends a school that is 63 percent white. In contrast, national figures show that the average exposure index for large southern districts had fallen below 50 by 1990, in large part because of white flight and falling enrollments.

(DX1 at 6). Dr. Armor explained that there is a greater degree of desegregation at the junior and senior high schools. "The exposure index is 70 or higher at the present time, and the dissimilarity index has remained below 30 since the beginning of the desegregation plan." *Id.*

Consequently, Dr. Armor concluded that the district-wide figures demonstrate that, "the district has maintained a very high degree of desegregation up to the present time. Hillsborough County has higher levels of desegregation than the

average large southern district, and it has higher levels of desegregation than other districts which have been declared unitary in the Eleventh Circuit." *Id.* at 7.

Dr. Armor also studied the student race ratios at all schools whose enrollments fell outside of the plus or minus 20% variance (whether or not it fell outside at the time he conducted his studies) for two (2) or more years between 1971 and 1995. *Id.* There were only twenty-two (22) schools, out of nearly 150 regular schools in the district, and only 15(10%) of the district schools were outside of the variances as of October 1995.[33] *Id.* Dr. Armor noted that none of the schools which were over 40% black as of October 1995, had been a former black school and none of these schools had a majority black enrollment before the 1971 Order. *Id.* at 7. Dr. Armor also emphasized that all of the schools that are over 40% black, except one (1), are located in the areas that Dr. Clark testified have experienced a substantial demographic change in the form of increasing black populations. *Id.*

In his analysis of the twenty-two (22) schools, Dr. Armor included a review of boundary changes that had the potential to affect racial composition by more than two (2) or three (3) percentage points. Dr. Armor compared the actual racial composition before the change to the projected racial composition after the change. *Id.* Dr. Armor concluded that the shift in demographics outlined by Dr. Clark explains why these schools moved outside of the plus or minus 20% range and that, despite the school board's efforts to improve racial balances, the boundary changes played a "relatively minor role in the racial

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[33]It should be noted that Dr. Armor's studies excluded schools which were 93% or more white because they did not deviate by 20%. However, these "white" schools cannot deviate by 20% or more until they become virtually 100% white.

composition of these schools, being completely overwhelmed by demographics." (DX 1 at 11). Moreover, Dr. Armor testified that, "none of the schools that were currently imbalanced or were imbalanced in the past were caused by board action. They were caused by demographics." (Tr3-53). Dr. Armor concluded that, "the [School] Board did implement a highly effective desegregation plan that virtually desegregated the entire district to a very high degree of desegregation, as high as I've ever seen anywhere in this country, but especially in the south, and that it maintained that plan for a very long time." (T3 at 49).

Plaintiffs expert, Dr. Shelley, also recognized that the boundary changes were not significant in improving racial compositions. Dr. Shelley reported that boundary changes have not consistently contributed to reducing racial imbalance. (PX2 at 9). Dr. Shelley indicated that half of the boundary changes affecting the racially imbalanced schools reduced the percentage of black students at that school and the other half, resulted in an increase. Dr. Shelley admitted that it is possible that a boundary change that improves racial balance in one (1) school could exacerbate racial imbalance in another. *Id.* However, Dr. Shelley opined that since Hillsborough County, as a whole, is not highly segregated, it should be possible to redraw boundary lines without adversely impacting neighboring schools. *Id.* at 17.

Significantly, Dr. Shelley's conclusions regarding redrawing boundaries were based solely on the five (5) elementary schools which became racially imbalanced between 1970 and 1980. *Id.* at 19. While Dr. Shelley emphasized that the attendance ***1308** zones of these five (5) schools do not adjoin one another, he failed to evaluate the attendance zones of all the schools which do adjoin the racially unbalanced schools. Defendants' Exhibit 8 graphically depicts the attendance zones for the sixteen (16) racially unbalanced schools and clearly

illustrates the difficulties in redrawing attendance zones. Undoubtedly, it would be possible to bus children across the county to ensure racial compositions that comport with the district-wide ratios; however, that would not be practicable and was not required by the Court's 1971 Order. Moreover, it is not required by the Constitution or governing law. Although affirmative steps are required to achieve the greatest practicable desegregation, heroic measures to ensure racial balance system-wide are not. *See Freeman*, 503 U.S. at 493, 112 S. Ct. 1430.

A distinction must be made between requiring Defendants to maintain specific race ratios and requiring Defendants to make affirmative efforts to desegregate the school system. It is clear that Defendants were not obligated to maintain specific race ratios at each school in the county. "Neither school authorities nor district courts are constitutionally required to make year-by- year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann*, 402 U.S. at 31-32, 91 S. Ct. 1267. However, the Court is concerned that Defendants have not yet accomplished that affirmative duty. Defendants have an affirmative duty to eliminate the former dual school system. As noted above, the ultimate goal of a desegregation remedy is "a unitary, nonracial system of public education." *Green*, 391 U.S. at 436, 88 S. Ct. 1689. The school system no longer discriminates against school children on the basis of race when it affirmatively has eliminated all vestiges of state-imposed segregation. *Id.* at 435, 437-38, 88 S. Ct. 1689.

"What is involved here is the question whether the School Board has achieved the 'racially nondiscriminatory school system' *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system." *Green*, 391 U.S. at 437, 88 S. Ct. 1689.

The inquiry is whether the School Board has taken steps adequate to abolish its dual segregated system. *Id.* The Supreme Court in *Green* explained that school boards which were "operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." Consequently, until a school system has discharged its duty to convert the dual system to a unitary one, the School Board's duty remains in place.[34] However, the Supreme Court in *Green* was faced with a school district that had not yet implemented an effective desegregation plan.

Since *Green*, the Supreme Court has had numerous opportunities to evaluate the effectiveness of desegregation plans which had already been implemented. In *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 96 S. Ct. 2697, 49 L. Ed. 2d 599 (1976) and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), the Supreme Court emphasized that, once a school system has achieved unitary status, a court may not order further relief to counteract resegregation that does not result from the School Board's discriminatory acts.[35]

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[34]The *Green* Court also noted that, " 'the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " 391 U.S. at 438 n. 4, 88 S. Ct. 1689.

[35]The Supreme Court has declined to precisely define the term "unitary" in a desegregation context. *See Dowell*, 498 U.S. 237 at 245, 111 S. Ct. 630, 112 L. Ed. 2d 715. However, to the extent the term is used to describe a situation where court supervision is no longer necessary, it must encompass a finding of good faith commitment. *See Freeman*, 503 U.S. at 490, 112 S. Ct. 1430.

The *Pasadena* case involved the appropriateness of the district court's requirement that the desegregation plan contain provisions insuring that minorities could never become the majority at any of the district's schools. *Id.* at 432, 96 S. Ct. 2697. Although ***1309** the Court in *Pasadena* only confronted "the question of whether the District Court was correct in denying relief when [the school district] in 1974 sought to modify the 'no majority' requirement as then interpreted by the District Court[,]" the Court reiterated the scope of permissible judicially created relief which is available to remedy violations of the Fourteenth Amendment. *Id.* at 432, 434, 96 S. Ct. 2697. The *Pasadena* Court explained that the district court had no authority to impose such an inflexible requirement when the subsequent changes in the racial composition of the schools might be caused by factors for which the school district could not be considered responsible. *Id.* at 434, 96 S. Ct. 2697. However, *Pasadena* cannot be applied as broadly as Defendants suggest.

The *Pasadena* Court held that, because the school district had obtained the objective of racial neutrality in its school attendance pattern when its desegregation plan was initially implemented, the district court could not require the school district to rearrange its attendance zones each year in order to ensure that the racial mix desired by the court was maintained in perpetuity. 427 U.S. at 436, 96 S. Ct. 2697. The Court explained that, "once [the school district] implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations . . ., the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *Id.* at 437, 96 S. Ct. 2697.

Significantly, the *Pasadena* Court cautioned against applying its rulings generally. The *Pasadena* Court explained that it was error to enforce the district court's order to "require

annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school." *Id.* at 435, 96 S. Ct. 2697. Subsequently, the Supreme Court distinguished the inflexible portion of the plan in that case from desegregation plans involving an evaluation under governing case law. *Id.* The *Pasadena* Court explained:

> [I]t is important to note what this case does not involve. The "no majority of any minority" requirement with respect to attendance zones did not call for defendants to submit "step at a time" plans by definition incomplete at inception. Nor did it call for a plan embodying specific revisions of the attendance zones for particular schools, as well as provisions for later appraisal of whether discrete individual modifications had achieved the "unitary system" required by *Brown.* The plan approved in this case applied in general terms to all Pasadena schools, and no one contests that its implementation did "achieve a system of determining admission to the public schools on a nonracial basis."

Id. (internal citations omitted).

In order to align the instant case with *Pasadena* and *Swann*, with regards to student assignments, it must be clear that: (1) the implementation of Defendants' desegregation plan established a racially neutral system of student assignment in Hillsborough County; and (2) any post-1971 changes in the racial composition of the schools in Hillsborough County were not in any manner caused by segregative actions chargeable to Defendants.

In the case at hand, the parties do not dispute that all of the schools in Hillsborough County were desegregated as of the 1971-1972 school year. As of October 27, 1971, there were no majority black schools among the school district's 122 schools

and only one (1) school, Lee Elementary, had more than a 40% black student population. Moreover, Plaintiffs do not assert that Defendants' system of student assignments continued to segregate students after the desegregation plan was initially implemented. Plaintiffs did not file any written objections in this case concerning the actual or projected enrollments of any school in Hillsborough County for more than twenty-two (22) years after the 1971 desegregation plan was implemented. Plaintiffs failed to object to the racial compositions developing in the school system, despite the fact that Lee Elementary had become more than 50% black and Cleveland, DeSoto, Edison, and Gary Elementary had become more than 40% black as early as 1974. Moreover, Plaintiffs did not file their first objections to projected racial enrollments until June 1994. Plaintiffs' inaction ***1310** indicates that there were no perceived violations of the 1971 Order.

There is no indication that the racial identity of the schools in Hillsborough County has been deliberately caused by segregative policies or practices by Defendants. Nevertheless, there is a presumption that the racial imbalance is traceable to the prior *de jure* dual system and Defendants must prove otherwise. The Court suspects that Defendants' inaction has contributed to the degree of racial unbalance in the school system. Notably, the 1971 Order was required because the School Board refused to act after the Supreme Court decided *Brown I* and *Brown II* in the 1950s. Importantly, the Supreme Court has emphasized that a mere racially neutral assignment plan may be inadequate. *Swann*, 402 U.S. at 28, 91 S. Ct. 1267. A neutral student assignment system will be insufficient if it "fail[s] to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain artificial racial separation." *Id.* at 28, 91 S. Ct. 1267. While the Court acknowledges that a race neutral attendance pattern was

implemented in the case at hand, Court supervision remains necessary. Neutrality alone is not sufficient.

"The district judge or the school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools." *Swann*, 402 U.S. at 26, 91 S. Ct. 1267 (emphasis added). While the effective implementation of a desegregation plan may satisfy an element of the school districts' obligation under a desegregation order or consent decree, the courts' supervisory responsibility remains until a school board has: (1) eliminated the vestiges of past discrimination to the extent practicable; (2) exhibited a record of full and satisfactory compliance with the decree; and (3) "demonstrated to the public and the parents of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the laws and the constitution that were the predicate for judicial intervention in the first place." *See Lockett v. Board of Education of Muscogee County School Dist.*, 92 F.3d 1092, 1098 (11th Cir.1996) (quoting *Freeman*, 503 U.S. at 491, 112 S. Ct. 1430) ("*Lockett I*"); *Lockett v. Board of Education of Muscogee County School Dist.*, 111 F.3d 839, 842 (11th Cir.1997) ("*Lockett II*"). "[O]ne of the prerequisites to relinquishment of control in whole or in part is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution." *Freeman v. Pitts*, 503 U.S. 467, 490, 112 S. Ct. 1430, 118 L. Ed. 2d 108 (1992).

"Once [Defendants] implemented a racially neutral attendance pattern in order to remedy [the specific] perceived constitutional violations on the part of the Defendants, [this Court] had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns." *See Pasadena*, 427 U.S. at 437, 96 S. Ct. 2697. However, Defendants were not relieved from their

obligations once a means to an end was implemented.[36]

> [A] school district does not escape its obligation to make affirmative efforts to remedy racial imbalances simply because the imbalances are caused by circumstances "over which [the school district] has no control"; instead, while under court supervision the school district must make efforts to eradicate all imbalances which are traceable to prior de jure segregation.

Lockett v. Board of Education of Muscogee County School Dist., 92 F.3d 1092 (11th Cir.1996) (citing *Freeman*, 503 U.S. at 491, 112 S. Ct. 1430). The School Board's obligations remain until the Court finds that the racial imbalances are not traceable to prior *de jure* segregation. Significantly, such a determination has not been made in the case at hand.

In *Lockett I*, the Eleventh Circuit entertained arguments which were similar to those advanced by the parties in the instant case. The school district initially implemented student ***1311** reassignment and attendance zone adjustments which effectively achieved its goal of proportionate student representation, pursuant to the district court's 1971 desegregation Order. *Id.* at 1095. Throughout the 1970s, the school district maintained consistent statistical racial compositions within its schools. *Id.* at 1096. During the same

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[36]Moreover, the fact that the parties entered into the 1991 Consent Order, requires additional consideration. Not only did Defendants remain obligated to fulfill their duties, in good faith, pursuant to the equitable relief ordered by the Court in 1971, but the Consent Order embodies an agreement of the parties and is contractual in nature to some extent.

period, the racial compositions of faculty and staff within most of the district's schools reflected the county-wide averages. *Id.*

However, by the end of the 1970s, the school district in *Lockett* began to curtail its desegregation efforts by reducing the number of student reassignments and attendance zone adjustments. *Id.* During this same time period, the demographics of the county began to shift. *Id.* By the mid-1980s, there was a decline in the number of schools with acceptable racial compositions and by 1991, a number of racially identifiable schools existed. *Id.* In 1993, the school district moved for a final dismissal and a declaration of unitary status. *Id.* In 1994, after an evidentiary hearing on the matter, the district court granted the school district's motion. *Id.*

Although the Eleventh Circuit initially reversed the district court (*Lockett I*), the Circuit Court subsequently granted the school districts' petition for rehearing and held that the district court's factual findings were not clearly erroneous and affirmed the district court's decision (*Lockett II*). *Lockett v. Board of Education of Muscogee County School Dist.*, 111 F.3d 839 (11th Cir.1997). Notwithstanding, the Eleventh Circuit in *Lockett I* reiterated established principles of law which are applicable to the case at hand.

In *Lockett I*, the school district argued that unitary status had been achieved by the 1980s and therefore, they were released from their obligations under the 1971 Order at that time, even though unitary status was not declared until 1994. 92 F.3d at 1097. Conversely, the plaintiffs argued that, "the school district's obligation to make affirmative efforts to desegregate the school system commenced in 1971 and did not end until the district court declared unitary status in 1994." *Id.* Moreover, plaintiffs argued that, the school district's failure to make good faith efforts to desegregate the system after the 1980s contributed to the racial imbalances in the schools. *Id.*

Significantly, the Circuit Court made it clear that, "[t]he school district was subject to the 1971 court order until such time as the district court vacated that order by declaring that the school district had achieved unitary status and complied with the order in good faith." *Id.* (citing *Pasadena*, 427 U.S. at 439-40, 96 S. Ct. 2697).

In the case at hand, Defendants continued their desegregation efforts after they initially achieved acceptable racial compositions throughout the school system in the 1970s. Moreover, Defendants continue to employ new desegregation techniques to date. Therefore, this case is somewhat distinguishable from *Lockett I* .The school district in *Lockett* implemented a neighborhood assignment plan which "affirmatively increased racial imbalances," whereas, Defendants in the instant case have not. *See Id.* at 1101. Furthermore, in *Lockett*, the school district never implemented a majority to minority transfer program, "a tool basic to 'every' desegregation program." *Id.*

Although Defendants in the case at hand have not "affirmatively" exacerbated racial imbalances and have implemented, *inter* alia, a majority to minority transfer program, Defendants "curtailed" their desegregation efforts.[37] Defendants never sought a determination of unitary status until the issue was raised *sua sponte* by the Court; however, for years, Defendants have failed to adequately address schools which became racially imbalanced. While the evidence presented by the parties establishes that a shift in demographics played a significant role in the racial compositions of the schools, Defendants have not demonstrated a good faith

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[37]With regards to the instant case, the term "curtail" may be slightly misleading. In some instances, Defendants had not implemented basic desegregation techniques until the 1990s.

commitment to desegregation. Certainly, Defendants deserve acknowledgment for their desegregation efforts thus far; however, the Court intends that its criticisms will serve as a guide to Defendants as they implement desegregation techniques in the future. Defendants must take affirmative steps in order to be released from the Court's supervision." ***1312** Each instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459, 99 S. Ct. 2941, 61 L. Ed. 2d 666 (1979).

II. Good Faith

A. Desegregation Techniques

Defendants have been relatively successful in implementing desegregation techniques; however, Plaintiffs assert that Defendants have not utilized the available techniques to the maximum extent practicable. The number of racially unbalanced schools in Hillsborough County is relatively small. As of 1995, there were twelve (12) schools which were 50% or more black and five (5) schools that were between 40 and 49% black. Also, as of October 30, 1995, there were eight (8) schools which were 93% or more white. While Defendants may have believed that they had no obligation to adjust attendance zones to affirmatively combat segregation, other desegregative devices were available. Moreover, despite the impracticalities attendant to attendance zone adjustments, Defendants have had additional opportunities to desegregate the school system to the maximum extent practicable.

(i) *Majority to Minority Transfers*

Plaintiffs argue that, even though majority black schools existed since, at least 1977, as of April 19, 1996, there was not one (1) majority to minority ("MTM") transfer granted. (Br. in

Supp. of Pls.' Obj. to R & R at 17); (T1 at 91); (PX 14). Moreover, Plaintiffs argue that, despite the fact that a MTM transfer program was part of the Court's 1971 desegregation Order, Defendants did not market its MTM program to eligible students and their families until 1995, and no transfers had been processed as of April 1996. Plaintiffs argue that MTM transfer programs are a commonly used desegregation technique which is effective and does not require changes in attendance zone boundaries. However, Plaintiffs assert, Defendants have been negligent in fulfilling their desegregation obligations. Certainly, the history of this technique in Hillsborough County is concerning.

Plaintiffs argue that, there is no evidence that: (1) a MTM transfer was ever seriously considered until recently; (2) Defendants understood how to operate a MTM program; or (3) Defendants made any efforts to implement an effective MTM transfer program. Plaintiffs point out that the Administrative Assistant to the Superintendent, Dr. John Miliziano, testified that he was unaware of how MTM transfer programs worked in other school districts and that he had not read any literature concerning MTM programs. (T1 at 87-89). Also, Dr. Miliziano testified that it was not until the issue of an ineffective MTM program was brought up by Plaintiffs that the program was announced to the district as a whole and Defendants took action to publish information about the program. *Id.* at 89. Dr. Miliziano testified that he believes some children have been approved for transfers since the School Board took action. *Id.*

Dr. Miliziano testified that the utility of the MTM transfer program was not fully appreciated in the past and that it is possible that students who had been denied a transfer under the special assignment program, could have been eligible for a transfer under the MTM program. (T1 at 91-93). However, it is clear that, when the desegregation plan was proposed to the Court in 1971, Defendants understood the utility of a MTM

program. In the Court's July 2, 1971, Order (Docket No. 250), the Court explained that the MTM program, other transfer rules, the Bi-Racial Committee, and approval of site locations had been required by previous orders. (July 2, 1971 Order, at 9). The Court noted that these programs and procedures may not be required if the School Board's plan is effectuated and accomplished. *Id.* Interestingly, Defendants, perhaps being overly optimistic, sought to avoid the implementation of the MTM program before the desegregation plan had been approved. The Court acknowledged:

> In its responsive memorandum of June 28, 1971, the defendants say:
>
> "(a) . . . Should the Desegregation Plan submitted by Defendants to the Court be approved, there would seem no purpose for retaining the majority to minority provisions ***1313** for transfer, since such plan should result in a black to white ratio of approximately 20% to 80% in each and every school; accordingly, and of necessity, black students would be in a minority in schools at all levels . . . ."

Id. Nevertheless, the Court opined that it would retain jurisdiction and "require the continuation of all of these procedures to be available and used as necessary." *Id.* The Court subsequently discussed Defendants' continuing responsibility and noted that, to effectuate the plan "will require the same type of community involvement, diligence and effectiveness as has already been shown [in developing the desegregation plan]." *Id.* at 9-10.

During the 1996 evidentiary hearing, the following exchange took place:

Q. [Dr. Miliziano] [a]re you aware of the treatment of majority to minority transfers in the original 1971 order?
A. To tell you the truth, Mr. Gonzalez, I was--I read that order probably a dozen times. I really was a bit confused as to what that meant.
Q. Okay. Let me represent to you that the court order contains the language with respect to that majority to minority transfer: "The court is retaining jurisdiction and will require the continuation of all of those procedures to be available and used as necessary."

Are you aware of the plaintiffs or any of the plaintiffs' representatives ever suggesting that MTM transfers were necessary again?

A. To my knowledge, no.

Q. Are you aware of anyone associated with the Legal Defense Fund ever complaining about the fact that that program was hidden or not available to students?

A. To my knowledge, no. And I dealt with the Biracial Committee for many years, and no member of the committee ever brought that up. And to tell you the truth, I thought it was one of those things that was considered by the court and it was never meant to apply.

It wasn't until recently that I, a person who has spent many, many years in dealing with the court order, maybe it's stupidity on my part, but I didn't even know that this hidden clause--this clause, not hidden, but this clause in the consent order meant really anything.

It wasn't until recently that it was brought to my attention that, hey, this thing is supposed to be done,

> and now that you have schools that are 50 percent black or higher, you're supposed to implement this policy.

(T1 at 106-07).

Plaintiffs argue that Dr. Miliziano's lack of understanding regarding the MTM program is significant because no Hillsborough County school system employee has more extensive school desegregation responsibilities than Dr. Miliziano. Plaintiffs maintain that the failure to understand and aggressively market the MTM program to the parents of children attending majority black schools illustrates Defendants' lack of good faith commitment to desegregation. Moreover, Plaintiffs maintain that this is another example of a lost opportunity.

It is very disturbing that Defendants' "in-house" desegregation expert testified that he did not completely understand the import of the MTM program. In 1971, Defendants argued that the transfer program would be unnecessary because all schools would be minority black. However, in 1996, Defendants assert that the usefulness of the program was not understood or appreciated. Notwithstanding, in Exhibit 2 to the Court's July 2, 1971, Order, the Court explicitly outlined the rules to be applied in connection with transfers and identified MTM transfers as the first exception to the transfer rule. Certainly, Defendants' lack of appreciation casts doubt on the competence of the individuals charged with the task of desegregating the schools. Moreover, Defendants could have sought clarification from the Court over the last two (2) decades.

The Magistrate Judge explained that, "[a]lthough the absence of M to M transfer applications is troubling, the Court's 1971 Order did not require the defendants to solicit M to M transfers; they were only required to grant them if requested.

There has been no violation of the Court's Order as to the M to M transfer policy." ® & R at 74). Notwithstanding, the Court finds that this interpretation ***1314** of Defendants' ongoing obligations is too narrow. While the Court did not specifically direct Defendants to market the program, surely if Defendants fully embraced their desegregation obligations they would have wanted to utilize this technique to the fullest extent or at least, made an effort to understand it.

> In the May 11, 1971, Order, the Court explained that,
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> Since 1954 it has been clear that segregated schools are illegal and that the school boards and the courts, if necessary, have a duty to take affirmative action to desegregate them.
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> On April 20, 1971, it became and is crystal clear that affirmative action ordered by this and other courts for that purpose, and consistently opposed by certain defendants, is legal.
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> * * * * * *
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> Some of this may not be known by some or all members of the present board, although it should be. To be sure that they do know, a copy of this Order and a copy of the April 20, 1971, Supreme Court opinion in *Swann v. Charlotte-Mecklenburg Board of Education*, will be sent separately to each defendant. It is assumed that being informed each will fulfill his or her sworn obligation to "support and defend the Constitution of the United States," as did the Court. Each should remember that he *is* a defendant, and that the Court *will* uphold its obligation.

(May 11, 1971, Order at 1-2) (citation omitted).

Significantly, the Supreme Court in *Swann*, emphasized that,

> [a]n optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such transfer program must grant the transferring student free transportation and space must be made available in the school to which he desires to move.

402 U.S. at 26-27, 91 S. Ct. 1267 (emphasis added).

The Court ordered service of this Supreme Court opinion on Defendants in 1971; however, Defendants failed to take the time to understand, let alone implement, an effective MTM program. The Supreme Court in *Swann* ordered that school districts provide free transportation to the student and make space available, but twenty (20) years later, Defendants seek to hide behind the fact that this Court did not specifically indicate that the program should be publicized. This falls far short of demonstrating good faith compliance and, is indeed, troubling.

Defendants have also gone to great lengths to align the instant case with the Supreme Court decision in *Freeman*. However, there are some substantial difference between the two (2) cases. Foremost, the school district in *Freeman* was comprised of 5.6% black students when the desegregation order was initially entered in 1969. 503 U.S. at 475, 112 S. Ct. 1430. Significantly, by 1986, the percentage of black students had

grown to 47%, whereas, in the case at hand, the influx has not been nearly as remarkable. *Id.* Moreover, the county had become highly segregated in *Freeman*. *Id.* In addition, the school district in *Freeman*, on its own initiative, implemented a majority to minority transfer program three (3) years after the desegregation order was entered. *Id.* at 479, 112 S. Ct. 1430. "The program was a marked success." *Id.* Conversely, in the instant case, Defendants had not granted one (1) majority to minority transfer as late as 1996, twenty-five (25) years after the desegregation order was entered.

(ii) *Magnet Schools*

In addition, Plaintiffs emphasize that Defendants failed to develop magnet schools and/or programs, except for the magnet program at Tampa Bay Technical High School, until 1993. Plaintiffs contend that magnet schools have been used by school districts for desegregation purposes since the 1970s. (PX1 at 10). Moreover, the federal government has provided special funds for such ***1315** schools since the 1980s. *Id.* However, the Hillsborough County school system did not create its first magnet schools until 1993. *Id.* While Defendants deserve praise for implementing these magnet schools/programs, the prolonged delay detracts from their achievement.

Plaintiffs argue that implementation of the Middle School Plan is still in progress and it is impossible to foresee the ultimate racial composition of all schools until the plan is completely implemented. Plaintiffs maintain that the race ratio projections for 1997, taken from the 1991 plan, were not met. Plaintiffs point out that the experience thus far, with regards to West Tampa, Edison, Cleveland, Sulphur Springs, and Clair Mel, has been that the proportion of black students at these schools has exceeded the projections made in 1991. Plaintiffs contend that if Defendants fail to take affirmative steps to adjust

race ratios after complete implementation of the Middle School Plan, the school system will experience an increase in the number of racially identifiable schools, as well as, the magnitude of racial identifiability of each school.

To illustrate, Plaintiffs argue that, before the plan, there were six (6) schools that were 50% black or higher. (PX 1 at 15-16). Although the projections in the Middle School Plan anticipated a decrease to five (5) schools, the actual number had increased to twelve (12) by the fall of 1995. *Id.* There were nine (9) schools that were between 40 an 49% black before the plan was implemented. *Id.* According to Defendants' 1991 projections, there was supposed to be seven (7) schools that were between 40 and 49% black. *Id.* By the fall of 1995, there were only five (5) schools in this range. *Id.* However, overall, fifteen (15) schools were considered racially unbalanced before the plan; the 1991 projections predicted that the number would decrease to twelve (12). *Id.* Unfortunately, the number increased to seventeen (17). *Id.*

(iii) *Ex Parte Communications*

An unfortunate occurrence which may have contributed to Defendants' apathetic attitude over the past several years was that Defendants were given *ex parte* advice from the previously presiding judicial officer. Plaintiffs argue that, "[t]he testimony of Dr. John Heur leads to further doubt about defendants' representations to this Court." (Pls.' Br. in Supp. of Pls. Objs. at 52). Plaintiffs explain that Dr. Heur served as the Director of Pupil Administrative Services for the Hillsborough County school system and was responsible for implementation of Defendants' desegregation plan, including participating in the submission of plans and annual reports to the Court. Dr. Heur testified that he had several *ex parte* conversations with the judge then presiding over this case, as well as, the presiding judge's law clerks. (T7 at 13-16).

Dr. Heur explained that most of the time he was asked to explain information included in the School Board's submissions to the Court. (T7 at 15). However, on one occasion, the presiding Judge told Dr. Heur that the schools could be "left alone" if the School Board had not been the cause of a deviation from the ideal race ratios stated in the 1971 desegregation Order. *Id.* at 16. Dr. Heur testified that, as a result of the *ex parte* conversation with the presiding judge, he understood it to mean that if the change in racial composition in a particular school was caused by housing patterns, rather than, gerrymandering done by the School Board, then the School Board was not obligated to make changes to that schools' attendance boundaries. *Id* at 17- 18. Notwithstanding, Dr. Heur testified that the School Board, in fact, continued to adjust the race ratios if they deviated from the target ratios. *Id.* at 18.

The Magistrate Judge emphasized that, regardless of any ex parte advice that may have been given, Defendants continued to take steps to improve the racial balances when making boundary changes and opening and closing schools. ® & R at 85). The Magistrate Judge explained that, "[i]f this advice was indeed given, there is no inconsistency between the advice and the Court's Orders. These *ex parte* conversations, while unfortunate, were not initiated by defendants and do not demonstrate a lack of good faith on the part of defendants in complying with the Court's orders."

There is no dispute that the *ex parte* communications were inappropriate. However, standing alone, the *ex parte* communications do not evidence bad faith. Nevertheless, ***1316** in light of the Court's findings, the communications may explain why Defendants failed to take affirmative action to desegregate the school system. Defendants have taken the position that, once the attendance zones were drawn and the schools reflected the system-wide racial composition, albeit for a brief period of time, the School Board had no further

obligation to take affirmative steps to convert to a unitary system. This philosophy is clearly erroneous. Consequently, Defendants have failed to meet the Constitutional commands espoused in *Brown v. Board of Educ. of Topeka, Kan.*, 349 U.S. 294, 75 S. Ct. 753, 99 L. ED. 2D. 1083 (1955), and the Court will retain jurisdiction over the educational policies related to student assignments.

In order to fully apprise the parties of the posture of this case, the Court will address Plaintiffs objections to the Magistrate Judge's findings in connection with the remaining *Green* factors. The following factual findings are taken from the Magistrate Judge's Report and Recommendation:[38]

FACULTY AND STAFF ASSIGNMENTS

1. For the 1993-1994 school year, 14% of the teachers in Hillsborough County were black. For the same year, blacks constituted 17% of the principals, 22.2% of the assistant principals, and 7.9% of the district administrators (at the main school board office). Of the noninstructional permanent personnel, 16.1% were black. Black teacher aides comprise 25.3% of the total teacher aides employed by the county.[39]

2. According to Marilyn Whittner, Director of Human Resources, the School Board has "a dearth of minority applicants for our teaching positions and we are constantly seeking minority teachers." (T2 at 105) The School Board focuses recruitment efforts at colleges with a substantial percentage of black graduates.

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[38]*See* R & R (Docket No. 809) pgs. 34-57.

[39]Defendants used district-wide employee data from the 1993-1994 school year at the unitary status hearing. (T2 at 134)

3. Additionally, a mentoring program has been instituted for black teachers who aspire to be administrators. More than one-half of the graduates of that program have been placed in administrative or teacher resource positions. (T2 at 108-09; PX 14)

4. For instructional and non-instructional personnel, the principal at an individual school interviews prospective applicants and is authorized to make offers contingent on approval by School Board and staff. Principals are given criteria for open positions. If Human Resources determines that a new hire would adversely affect the racial ratio at a particular school it will disapprove the offer unless no other qualified candidates are available. (T2 at 112-116)

5. Instructional personnel employed by the School Board are represented by a union which negotiates salaries based on the level of service and academic degree held by the employee. These salary levels are applied across-the-board to all teachers. (T2 at 114-15

6. There are currently no schools in which black teachers or staff constitute a majority nor has that situation existed in the past since the 1971 Order was entered. (DX 7)

7. The parties' experts differ on whether some schools are racially identifiable due to their faculty and staff compositions. Using a 15% deviation standard, Dr. Stevens identified twelve elementary schools which are not in compliance with the district-wide ratio. However, Dr. Armor, Defendants' expert, did not find any schools which fit into this category. This is because Dr. Armor used only faculty data; Dr. Stevens used data from the annual reports which aggregate faculty and staff and include non-certified personnel. (T4 at 139) However, the 14% figure cited by Defendants referred only to black faculty, not staff. (T2 at 130, 132)

8. None of the Court's Orders have ever required the School Board to provide racial balance at the upper management level. However, Plaintiffs note the paucity of upper-level black administrators during the time the School Board has operated under court supervision. During this period, only one (1) of the six (6) Assistant Superintendent positions has been held by a black individual: Assistant Superintendent of Support Services. (T7 at 145-47)

***1317** 9. Defendants have never been found liable for racial discrimination in employment based on records which have been maintained since at least 1977. Some complaints have been resolved at the administrative stage. (T7 at 199-200)

10. The School Board has in place grievance procedures which can be utilized by parents and students as well as employees and includes various levels of review, including a public hearing before the School Board. Student handbooks distributed to every student at the start of the school year outline these procedures. (T7 at 201-04)

11. Dr. Samuel Horton, an educator with the School Board between 1977 and 1991, served as General Director of Secondary Education where he helped develop guidelines for the gifted program among other programs. He noted the absence of any blacks in assistant superintendent positions during that time. Dr. Horton, who is African-American, stated that he applied twice for the position of Assistant Superintendent for Instruction but was not selected either time. While he did not file a grievance, Dr. Horton testified that he believed he was not selected due to his race. (T6 at 88-96; 103)

12. Ann Porter, head of the Tampa branch of the NAACP, testified about concerns about black males being denied employment opportunities and other complaints she

receives.[40] Ms. Porter, who is African-American, meets with the Superintendent and staff on the average of once or twice a month. This working relationship has become stronger with the current Superintendent, Dr. Earl Lennard. Although she is opposed to a declaration of unitary status at this time, Ms. Porter admitted that many complaints are resolved through these informal meetings. (T6 at 139-41)

TRANSPORTATION

13. With regard to transportation of students, the School Board's obligation has been to insure that bus routes and assignment of students to buses "assures the transportation of all eligible students on a non-segregated and otherwise non-discriminatory basis" and to regularly re-examine its transportation system. (July 1971 Order at 10)

14. In 1996, the School Board transported approximately 80,000 students daily. It is the fifth largest school district in the nation in terms of the numbers of students transported. (T1 at 123) For the 1994-95 school year, the School Board received over $17 million in state funding for transportation. (DX 24)

15. As required by Florida law, any student attending a school two (2) or more miles from his residence must be furnished transportation by the school district. (DX 21) The School Board has always complied with this requirement. (T1 at 122-25)

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[40]Ms. Porter was not asked about a venture between the University of South Florida and the School Board launched in August 1995 to place black male teachers with the School Board after graduation. (DX 14, "Project PILOT" documents)

16. The School Board provides transportation for all students who qualify and no distinctions are drawn as to race. (T1 at 131-33)

17. The desegregation technique adopted in the 1971 Order involved closing the formerly all black schools and assigning them to "satellite" attendance zones. (T4 at 135-36)

18. The School Board has maintained data on the number of students transported annually and their race. For the 1995-96 school year, approximately 18,400 students were transported for desegregation purposes including students attending magnet schools. (PX 1 at 20)

19. Of this number, more black students than white students were transported at each of the three (3) school levels: elementary, middle, and high school. (PX 1 at 20)[41]

20. At no time after the 1971 Order was entered did Plaintiffs raise any objection about the number of students bused, including when the desegregation plan was modified in the 1991 Consent Order due to implementation of the Middle School Plan.

***1318** 21. Part of the reason for adopting the Middle School Plan was to allow students to attend schools close to their homes as much as possible. (T1 at 65)

22. Although the 1971 Order did not require provision of transportation for after-school activities, the School Board

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[41]Of the elementary students transported 23% were black and 10% were white. At the middle school level 26% were black and 18% were white. Of the high school students, 24% were black and 8% were white. (PX 1 at 20)

provides "activity buses" for after- school activities to afford students living in satellite areas (a non- contiguous attendance zone area) the opportunity to participate in those activities if they were not able to provide their own transportation. Because the junior high schools are being phased into middle schools which are "self-contained" in their activities, the activity buses are primarily used at the high schools. (T1 at 123-30) Activity buses are provided for any students who need to stay after school for any reason, and are not limited to athletics or clubs. (T1 at 138-41)

23. In 1989, the School Board examined whether providing only one (1) activity bus per satellite area met the needs of the students. The Superintendent and his staff determined that more than one (1) activity bus per school might be needed on certain days due to the number of activities and events scheduled at the schools. (DX 23)

24. This policy was implemented and remains in effect today. The School Board supervisor of transportation surveys schools on a weekly or daily basis to determine the number of buses needed. (T 131-36; 138-41)

EXTRACURRICULAR ACTIVITIES

25. Under this Court's desegregation plan the School Board has been ordered to regularly re-examine its extracurricular activities to insure that they are maintained and operated on a non-segregated and non-discriminatory basis. (July 1971 Order at 10)

26. In the fall of 1971, the Hillsborough County school system was integrated in its athletic programs and all students, regardless of race, were given an equal opportunity to participate in athletics. (T1 at 112-13)

27. Since that time, a committee composed of the athletic director and assistant school principals has regularly reviewed proposed changes in the athletic programs pursuant to policies adopted by the School Board. The School Board offers a number of athletic programs, ten (10) for females and ten (10) for males. (T1 at 113-15)

28. Athletic activities are offered at each senior high school and existing junior high school. They have been eliminated at the middle schools as part of the restructuring program and due to funding. The director of athletics hopes to provide athletic programs at the middle schools in the future. (T1 at 114-15; 119-20)

29. Of total student participation in athletics, approximately 23% of the athletes were black and approximately 77% were white for the school year 1996-1997. Participation varied from school to school and sport to sport. For example, total participation in basketball for black students was 54% (males) and 49% (females). On the other hand, participation by blacks on high school swim teams was very low. Only three (3) black students (1 female, and 2 males) participated on high school swim teams. Over 18% of the cheerleaders were black. (DX 28; T1 at 115-19)

30. The School Board also offers a variety of other extracurricular activities at senior high schools, including: drama, choral program, string and instrumental music programs, honor clubs, service clubs and various interest clubs. (T2 at 127-28)

31. Defendants do not maintain data on a school by school basis for extracurricular activities but do track overall participation by race. In 1995, black students accounted for 11% of the honor society memberships, 12% of drama clubs,

27% of student councils, 20% of marching bands, 14% of orchestras, and 19% of choral groups. (PX 1 at 27)

32. These activities are open to all students and no students are denied the opportunity to participate because of their race.[42]

*1319 FACILITIES AND RESOURCE ALLOCATION

Site Selection and School Openings and Closings

33. The School Board's duty as to facilities under this Court's Order is the same as with transportation and extracurricular activities. As required by prior orders of the Court, the School Board was to make sure that school construction, school consolidation and site selection (including the location of any temporary classrooms) would be "done in a manner which will prevent the recurrence of the dual school structure." (July 1971 Order at 11)

34. The School Board has reported to this Court the opening and closing of schools and the impact of these actions on the race ratios at the schools. (T1 at 24) It has also presented proposed plans to the Bi-Racial Committee for input. (T1 at 64)

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[42]Mae King, mother of an Armwood High School student, testified that she observed cheerleading try-outs at Armwood recently because she was concerned that there were not enough black cheerleaders. As a result of the try-outs, however, three (3) blacks were chosen for the varsity squad and three (3) were chosen for the junior squad. (T4 at 17-27) Ms. King also recounted an incident where a suggestion was made at a PTA meeting to have a black disc jockey at a school dance and some of the people at the meeting got upset and walked out. (T4 at 20-21; 27-28)

35. Between 1971 and 1993 the School Board has constructed 25 new schools. In most cases, the percentage of black students attending these schools the first year was brought closer to the 80/20 ratio. (DX 4)[43] By 1995, five additional schools were built. (PX 1 at 8) None of the new schools has been opened with an all-white population or a black population of close to 40 percent. (T1 at 26)

36. As a general rule, the School Board has approved construction of new schools in areas of increasing population growth and where the greatest amount of overcrowding exists. (T1 at 25) During the past twenty-five (25) years, most new schools have been opened in the suburbs. In every case of a new school opening, the School Board has taken into account the projected race ratios at the new schools and assigned satellite attendance areas if necessary to maintain a racial balance at those schools. (T1 at 33) Especially with the elementary schools, the School Board tried to assign students to a school near their residence so they could walk to school. (T1 at 43)

37. A total of nine (9) schools have been closed since the 1971-1972 school year. (DX 5) When those schools were closed, the School Board took into account the race ratios at the closed school and the schools to which the pupils were reassigned. (T1 at 30-31) In most cases, the closing of the schools brought the schools the students were reassigned to closer to the 80/20 ratio. (DX 5)

38. Plaintiffs have been notified of all school construction through the reports filed with the Court as to boundary changes. Plaintiffs have never objected to the

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[43]The School Board's exhibit does not address schools opened after the 1993 school year.

location of new schools. Although most of the new schools have been opened in the suburbs, Blake High School, which is a magnet high school opened in the 1997-1998 school year near downtown Tampa. Defendants have also opened several magnet schools in predominantly black, inner-city areas: Lee, Phillip Shore, and Dunbar Elementary Schools, as well as, Young and Middleton Middle Schools. (T1 at 155; 174-177)

Overcrowding

39. During the past ten (10) to twelve (12) years, overcrowding has become a problem for most Hillsborough County schools and double sessions a reality at some. (T1 at 61)

40. Plaintiffs introduced evidence that the schools having a black student enrollment of 40% or more are more likely to be overcrowded in terms of their Florida Inventory of School Houses (FISH) capacity. Plaintiffs' demographics expert, Dr. Shelley, testified that schools with a 40% or more black enrollment are more likely to have enrollments significantly over their FISH capacities than schools which are racially balanced. (T4 at 37; PX 2 at 11-13, 22-23)

41. Dr. Shelley's data also shows that in 1995, a total of 102 public schools in Hillsborough County were more than 25% over their FISH capacity: eighty-eight (88) were racially balanced schools and fourteen (14) were unbalanced[44] schools. Only eight (8) of the ***1320** eighty-eight (88) balanced schools were more than 50% over their FISH capacity but four (4) of the fourteen (14) unbalanced schools fell into this category. (PX 2 at 23)

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[44]Dr. Shelley used the same measure of racial imbalance used by Dr. Armor and Dr. Stevens.

42. However, the FISH capacity of a school does not include portable classrooms. Use of portables does not necessarily mean that a school is overcrowded. (T4 at 101-03)[45]

43. Some classes, particularly those which are federally funded, provide an opportunity for a lower pupil to teacher ratio. Thus, a classroom built for twenty-five (25) or thirty (30) children may hold only twenty (20) children. (T1 at 63-64) Most, if not all, of the sixteen (16) schools with black student enrollments of 40% or more are included in the sixty-one (61) "Title 1" schools in Hillsborough County which received additional funding per pupil for the 1996-1997 school year. (DX 37)

44. The School Board recognizes that overcrowding is a serious problem and that the entire community is concerned about it. Last year, voters approved a sales tax increase. Moreover, the School Board appointed an Overcrowded Schools Task Force. The Superintendent and his staff compiled data for all Hillsborough County public schools including FISH capacity, number of portables, as well as the acreage of each school site. The Percentage of Capacity Report (DX 32) generated for the Task Force and the School Board is being used to determine what measures need to be taken to relieve overcrowding. (T7 at 222-24)

45. Although no testimony was provided interpreting the Percentage of Capacity Report in terms of individual schools, it appears that of the 105 elementary schools surveyed, the ten (10) elementary schools with the highest number of points

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[45]Defendants have provided a 46-page list entitled "Relocatable Classroom Inventory" which listing all portable classrooms placed in use between 1949 and 1995 and their locations. (DX 29)

include Edison, Witter, DeSoto, Shaw and Cleveland, all of which have black student enrollments of 40% or more. (DX 32, Elementary Schools, at 1)

Teacher Resources

46. For the 1992-1993 and 1994-1995 school years, schools with a black student enrollment of 40% or more had a lower teacher-student ratio than the other schools with fewer than 40% black students. (DX 1, charts 33 and 36)

47. For this two-year period, there was also no discernable difference in terms of educational degrees and experience between the teachers at the over 40% schools and those which were under 40% in terms of black student enrollment. (DX 1, charts 33-36)

Expenditures

48. In 1995, the School Board had a budget of $1.2 billion. (T7 at 150)

49. Funding is received from three (3) separate sources: federal, state, and local. Funds for operating expenses come from the Florida Educational Finance Program (FEFP), a state program that funds school districts based on the needs of students and the costs to provide education in the school district as opposed to other Florida school districts. The FEFP funds come from three (3) sources: state revenue based on sales tax, local property tax revenue, and revenue from the state lottery. (T1 at 185-88)

50. The School Board also receives funding from the federal government for educating handicapped students and funding based on the socioeconomic needs of the students. Capital outlay expenses for new schools and other capital

expenses come from local taxes. The School Board also receives some state funds generated from gross receipts on utilities. (T1 at 188)

51. Various agencies of the federal and state government regularly audit the School Board to insure expenses meet the program requirements and that funds are allocated on an equitable basis. (T1 at 190-91; 195-97)

52. There is no difference in the per capita expenditures of the School Board on instructional salaries for teachers district-wide regardless of the racial composition of the schools. (DX 1, charts 37, 40) As stated in the preceding discussion of faculty and staff, instructional salaries are set by the collective bargaining agreement between the teacher's ***1321** association and the School Board. The federal government also prescribes comparability standards for employees paid by federal funds. (T1 at 199)

53. Funding for instructional resources is allocated by the School Board on a pupil by pupil basis without regard to race, ethnicity, gender, or other limits such as the FISH capacity for the school. When a group of schools is converted to the middle school plan, those schools receive additional resources due to the conversion. (T7 at 191-93)

54. A comparison of expenditures for instructional supplies and equipment for fiscal years 1993 and 1995 showed that elementary and junior high schools which were more than 40% black received slightly less funding than schools which were less than 40% black. (DX 1, charts 38 and 41)

55. The School Board attributes this difference to "conversion funds distributed to schools which were newly constructed or reconfigured pursuant to the Middle School Plan" and notes that "[m]ost of the over 40% schools [are] not

scheduled for conversion until the 1996-1997 and 1997-1998 school years." (Dkt. 797 at 83) The record supports this argument. (T1 at 97)

56. In addition, a study of total capital expenditures for fiscal years 1993 and 1995 indicates that there was essentially no difference between schools which were over or under 40% black. During the latter year, elementary schools which were over 40% black received more funding. (DX 1, charts 39 and 42)

57. A review of capital expenditures during the period 1991 to 1995 by Dr. Armor revealed that expenditures for inner city elementary schools (which comprise most if not all of the more than 40% black schools) were slightly higher than those of the other elementary schools.[46] Spending for the inner city junior high schools was substantially higher than other junior high schools. (DX 1, chart 43)

QUALITY OF EDUCATION

58. Several witnesses called by Plaintiffs, including Plaintiff Andrew Manning and School Board Chair Doris Reddick, testified poignantly about the differences between black and white schools in the era of *de jure* segregation. Mr.

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[46]Darrell Daniels, one of the witnesses called by Plaintiffs, is employed with the Urban League and operates youth development programs at Robles and thirty-one (31) other schools. One (1) of his children attends Robles. While commending the principal of Robles, Mr. Daniels, who is African American, criticized the lack of commitment to education which he saw in the other personnel at the school. He also felt that Robles did not have the equipment such as computers which other schools have. However, he agreed that a school's commitment to education can vary regardless of the racial make-up of the school. (T6 at 58-77)

Manning and Ms. Reddick attended public schools in Hillsborough County. Ms. Joanna Tokley taught in the public schools, both before and after the Court's 1971 desegregation order. All three (3) are African-American. (T3 at 163-68; T5 at 20-23; T6 at 103-110)

59. Orders entered in this case have not required the School Board, in dismantling the dual school system, to attain specified levels of student achievement or any other standard to evaluate quality of education. However, this Court's referral order directed that the quality of education, along with the other *Green* factors be evaluated, as well as, the School Board's good-faith commitment in determining whether the public schools of Hillsborough County have attained unitary status.

60. Evidence presented by the parties concerning the quality of education today focused on academic achievement, enrollment in gifted programs, and suspension and dropout rates. Other factors bearing on quality of education such as facilities and resources as well as magnet programs have been addressed in the preceding sections.

Achievement Tests

61. Since 1977, the School Board has examined the results of achievement tests by students of different races on a regular basis. (T2 at 147)

62. Dr. John Hilderbrand, who has supervised testing for the Hillsborough County school system since about 1977, testified that there are an increasing number of state-mandated tests for students that are administered ***1322** and evaluated by the School Board. (T2 at 138-40)

63. On the Stanford Achievement Test, Hillsborough County students scored slightly below the 50th percentile in

reading and slightly above the 50th percentile in math and language which is the average rank for a national population. (T2 at 139-140) A standardized writing exam given to students in the fourth, eighth and tenth grades demonstrates that Hillsborough County students score higher than any of the other large school districts in the state. (T 2 at 140) Similar results are obtained on the High School Competency Test (HSCT). (T2 at 141) Scores for black students on the writing exam and HSCT show that Hillsborough County students outperform state averages for those tests. (T2 at 141)

64. A voluntary test taken by about 47% of seniors in high school--the Scholastic Assessment Test--has consistently produced results that place Hillsborough County students above national and state averages. When the scores are analyzed by race, the same result is shown. Black students in Hillsborough County outperform state and national norms. (T2 at 141)

65. In attempting to evaluate how well the school system is educating all of its students, Dr. Armor examined standardized tests (the Stanford Achievement Test) given to fifth grade students in Hillsborough County in the spring of 1994 and the spring of 1995. Overall, black students scored sixteen (16) to seventeen (17) points lower than white students in reading and math. (T3 at 88-89; DX 1, chart 44) This represents approximately three-fourths of a standard deviation. (DX 1 at 21)

66. A nationwide study conducted in 1992 found that similar differences exist between blacks and whites at all grade levels in math and reading; the achievement gap ranges from two-thirds to four-fifths of a standard deviation depending on the grade and test level. (DX 1 at 21)

67. However, when performing a regression analysis which used socioeconomic factors relating to family income,

single or two parent families, and the educational background of the parents, the gap in scores between black and white students narrows considerably. (T3 at 90-101; DX 1, chart 45) Dr. Armor concluded that about 60% of the gap in the reading scores for black and white students and about 66% of the math scores can be explained by socioeconomic factors. (DX 1, chart 46)

68. Additionally, when the first grade test scores for the same group of students are added as an additional variable, almost 75% of the reading gap and 90% of the math gap is explained by these variables.[47] (DX 1 at 22-23, chart 47)

69. An analysis of Stanford Achievement Tests taken by eighth grade students revealed similar results. About 71-72% of the gap in reading scores and about 84-86% of the gap in math scores between black and white students in Hillsborough County for the same years was attributable to a combination of socioeconomic factors and first grade test scores. (DX 1 at 23, charts 48 and 49; T4 at 98-100)

70. Dr. Robert Crain, a witness called by plaintiffs, criticized some of the assumptions and methodology employed by Dr. Armor in arriving at his conclusions. (T6 at 157-207)

71. Dr. Crain disagreed with Dr. Armor's use of first grade test scores as predictors of student achievement entering first grade because the tests are given in the spring rather than in the fall. (T6 at 162-63) However, Dr. Crain agreed that a

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[47]First grade test scores are used as a predictor of student achievement or skills before entering school. (T3 at 96) However, the tests are given in the spring of the school year rather than the fall and therefore are the product of the first grade curriculum to an extent. (T6 at 253; 283; T7 at 186-87)

student's entry-level skills are important predictors of how well a student will perform on the fourth and eighth grade tests. (T6 at 253-53)

72. Dr. Crain also disagreed with Dr. Armor's use of neighborhood data to determine the variables of family income and educational level of parents because that data reflected averages rather than actual figures for a neighborhood and therefore would presumably include both black and white families. (T6 at 168-73; 236) However, Dr. Crain uses neighborhood income in the studies he conducts. (***1323** T6 at 236) Dr.Crain also questioned whether family income and educational background could be remnants of the prior segregated school system. (T6 at 174-76)

73. Overall, Dr. Crain thought that Dr. Armor had overestimated the effects of socioeconomic factors on achievement test scores. (T6 at 192) Although he disagreed with some variables used by Dr. Armor, Dr. Crain did agree that the socioeconomic factors of free lunch and the number of parents at home were relevant and important variables. (T6 at 266) Using these factors, he obtained a line of regression similar to Dr. Armor's study. Dr. Crain did not determine the statistical significance of the differences between his study and Dr. Armor's. (T6 at 270)[48]

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[48]Dr. Crain disagreed with Dr. Armor's use of a "two-tailed" statistical model and felt that he should have used a "single-tailed" analysis. (T6 at 274) His preference for the single-tailed analysis was that "no one . . . would expect blacks to score better in higher black schools." (T6 at 274) The reasons cited by Dr. Armor for use of the two-tailed analysis are more persuasive and refute Dr. Crain's assumption that black students in schools with a higher black enrollment will always score lower than those students in schools with a lower black enrollment. (T7 at 161-69)

74. Dr. Crain's study showed that fifth-grade black students attending schools that were at least 40% black performed deficiently when compared with their counterparts attending schools that were under 40% black. (T6 at 206-07) However, these differences occurred only with reading. There were no differences in math. (T6 at 281-82)

75. However, when Dr. Crain used the same variables as Dr. Armor, he reached substantially the same results. (T6 at 265-66)

Academic Outcome

76. To evaluate how well the school system is doing in educating high school students, Dr. Armor examined grade averages and college plans as no standardized tests are taken by twelfth graders. White students have a 2.9 grade average; black students have a 2.3 grade average. Fifty-six (56) percent of the high school seniors who were white planned to attend college as compared to 45% of black students. (DX 1 at 24-25, chart 54)

77. When adjustment is made for socioeconomic factors and tenth grade achievement tests, Dr. Armor concluded that the grade average gap for black and white seniors would be only about .15 grade point. (DX 1 at 25, chart 55) After adjusting for socioeconomic factors, the difference between black seniors and white seniors in terms of college plans is practically negligible. (DX 1 at 25, chart 55)

Gifted Programs

78. As of October 1996, approximately 75% of the students enrolled in Hillsborough County gifted programs were white and approximately 9% were black. The remaining 16% were from other minority groups: 11% Hispanic, 4% Asian, and Indian and multi-cultural, less than 1% each. (T2 at 151-

52) While the number of black students in the gifted program is disproportionate to the number of black students enrolled in public schools, students must both apply to the gifted program and meet minimum criteria including attainment of a minimum score on a standardized test.

79. Until 1991, admission into gifted programs was set by state standards requiring an IQ test of 130 or higher. That year, the state adopted a plan to increase the number of minority gifted students and invited school districts to submit alternate criteria for admission. Hillsborough County elected to participate and submitted criteria under this program (referred to as "Plan B") which included an IQ score of 115 or higher together with demonstrated academic achievement and other characteristics typical of gifted individuals. (T 153- 56)

80. Implemented in 1993, the "Plan B" program continues to this day. Dr. Stevens noted that the school district's implementation of "Plan B" had increased the proportion of black pupils in the gifted program. (PX 1 at 31)

81. Ronnie King, number two (2) in his class at Armwood High School, moved to Tampa from Colorado. He had been enrolled in gifted programs in Colorado. He *1324 missed a year of participation in gifted programs in seventh grade due to the transfer and having to be retested. His mother was later told that he did not need to be retested. Mr. King, who is African-American, was placed in gifted programs in the eighth grade and has participated in those programs since that time. (T6 at 43-55).

Dropout Rates

82. Defendants monitor dropout rates and have a program designed to minimize dropouts. In the elementary

schools, the program relies on enhancing reading, math, and skills development in small groups of students. (T7 at 206-07)

83. In the junior and middle schools, the School Board focuses on students who may be at risk of dropping out and provides those students with additional academic experiences with a low teacher to student ratio. At the senior high schools, defendants provide additional counselors and teachers in a graduation enhancement program. (T7 at 207)

84. Additionally, the School Board provides a monthly report of prospective dropouts to the principals of each school. The principals are expected to follow-up with each student on an individual basis to give specific suggestions on how to stay in school or participate in alternate programs such as the GED program or adult education which meets the needs of the student. (T7 at 207)

85. The dropout rates for Hillsborough County public schools are the lowest in the state for similar large urban school districts. In the past five (5) years, dropout rates have averaged about 3 1/2 %. (T7 at 208-09)

86. Dr. Armor examined data for the high school graduating class of 1995 beginning when those graduates were in the eighth grade. The difference in dropout rates for blacks (15%) and whites (9%) is not significant. When adjusted for socioeconomic factors, that difference is negligible. (DX 1 at 24, charts 52, 53)

Suspension Policies and Rates

87. The School Board also tracks suspensions and expulsions by sex, race, and age. The suspension rates for Hillsborough County are lower than state-wide averages in some areas and for some groups. (T7 at 234) The School

District has out-of-school suspension programs as well as seven (7) alternative school sites. Individual schools can elect to run an in-school suspension program; that decision is left up to the administration at each school. (T7 at 234-36)

88. Dr. Armor did not examine suspension rates, but Dr. Stevens did. After examining four (4) years of data (1990-1994), Dr. Stevens concluded that black students are suspended from school at disproportionately high rates. He found that in 1994-1995 the suspension rate for black students was two (2) to four (4) times higher than the rate for white students depending upon grade level and the type of suspension. This data did not lead Dr. Stevens to infer racial discrimination, however. His criticism was that the School Board had not examined this data more closely on a school-by-school basis "to verify that disparities are not race-related." (PX 1 at 29-30)

B. Faculty and Staff Assignments

Plaintiffs object to the Magistrate Judge's Recommendation that unitary status be declared with regards to faculty and staff assignments. Plaintiffs point out that the Court's July 2, 1971, Order provides:

> Principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for black students or white students. Such personnel shall be assigned so that the ratio of black to white teachers in each school, and ratio of other staff in each are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system.

(July 2, 1971, Order at 10). Plaintiffs argue that the Order specifically contemplates the inclusion of faculty and staff in

the analysis and staff assignment is expressly listed as a Green factor. Plaintiffs assert that the evidence on staff which the Magistrate Judge deemed unreliable is a critical component of desegregation orders in general, and particularly, to the desegregation Order in this case.

Plaintiffs argue that, without exception, schools with higher percentages of black faculty ***1325** and staff, fall into one (1) of three (3) categories: (1) a high percentage of black student enrollment, (2) a historically black school prior to the 1971 Order, or (3) a school located in the inner city. *See* (PX 1i (Appendix to Pls. Proposed Findings of Fact and Conclusions of Law)). Plaintiffs emphasize that the schools deviate 10% or more from the district-wide faculty and staff average and many deviate by 15% or more.

Conversely, Defendants argue that the Court's 1971 desegregation Order, which dealt exclusively with student assignment, did not treat faculty and staff. Moreover, Defendants argue that when the Court ordered that, "[p]rincipals, teachers, teacher-aides and other staff . . . be assigned so that the ratio of black to white teachers in each school, and the ratio of other staff in each are substantially the same as each such ratio is to the teachers and other staff, respectively, in the entire school system," the Court failed to provide a specific statistical variance which was to be used in assessing compliance with its directives. Defendants point out that, in the July 2, 1971, Order, the Court acknowledged that faculty desegregation had been accomplished in the 1970 school year and declined to continue the "detailed procedure" requested by Plaintiffs. (July 2, 1971, Order at 8). Nevertheless, the Court continued the requirement for faculty desegregation.

Defendants explain that they do not maintain data on faculty and staff broken down by certificated (teachers and other instructional staff) and non-certificated (aides) employees.

Defendants assert that the collection of data in this manner is entirely consistent with the Court's previous orders, which dealt with all "staff" who "work directly with children." Moreover, Defendants contend that, although the Court required that Defendants maintain faculties at each school which reflect the system-wide employment ratios and did not provide any specific level of hiring black teachers since the entry of the Court's 1971 Order, Defendants have attempted to meet a "self-imposed" goal of faculties which are 80% white and 20% black to reflect the system-wide race ratio of students in the system. (T2 at 106). Defendants admit that they have never met this goal; however, Defendants assert that they have made, and continue to make, efforts to meet the 20% goal.

The Court finds that Defendants have been complying in good faith with the Court's Orders and Defendants should continue their efforts until unitary status is declared. Among Defendants affirmative efforts are the adoption of the recommendations of the Minority Recruitment Task Force with regards to strategies and activities directed towards increasing the number of black teachers and administrators in the school system. (T2 at 107). Defendants have employed aggressive minority recruitment techniques which have been successful. *Id.* at 105-06. Defendants have also imposed certain restrictions on schools having less than 20% black faculties. For instance, the School Board prevents black teachers from moving away from a certain school when that teacher's presence is needed to maintain racial balance. In addition, the School Board prohibits a principal from hiring a white teacher at the imbalanced schools unless there are no suitable black candidates. (T2 at 115). The School Board imposes similar restrictions on black and white teachers with regards to transfers and reassignments. The School Board has been making administrative decisions solely based on the racial balance of the transferring and receiving schools.

Despite the inability of the parties to agree on a standard on which to base compliance, the Court finds that Defendants' 15% variance is useful. Although the Court commends Defendants efforts in this area, Defendants shall include staff assignments in their subsequent evaluations and provide evidence in this regard when unitary status is sought in the future. Moreover, the parties shall confer and endeavor to agree on a measurement to be used in subsequent submissions to the Court. Plaintiffs' objections to the Magistrate Judge's findings are overruled in all other respects.

C. Transportation

Plaintiffs object to the Magistrate Judge's findings concerning transportation of students in Hillsborough County because black students bear a disproportionate burden. Plaintiffs contend that, at the elementary *1326 school level, 23% of all black students and 10% of all white students are transported for desegregation purposes. (PX 1 at 20; PX 1f). At the middle school level, 26% of all black students and 18% of all white students of all white students are transported for desegregation purposes. *Id.* At the high school level, 24% of all black students and 8% of all white students are transported for desegregation purposes. *Id.* However, Plaintiffs concede that, to the extent busing is considered a burden on the student, these figures overstate the number of students bused for desegregation purposes because the figures include students who attend magnet schools and do so voluntarily. Nevertheless, Plaintiffs point out that black students are still more likely than whites to be assigned to a bus for desegregation purposes.

Plaintiffs argue that the issue of busing is directly linked to Defendants' student assignment and site selection policies. Particularly, Plaintiffs argue that, the perpetuation of the satellite program places a disproportionate transportation burden on black students who live in the satellite areas.

Moreover, Plaintiffs argue that the students who are bussed may be disadvantaged in terms of participation in extracurricular activities.

Conversely, Defendants argue that, in *Mannings v. Board of Public Instruction*, 427 F.2d 874 (5th Cir.1970) ("*Mannings III*"), the Fifth Circuit found that the transportation system in Hillsborough County had been desegregated by this Court's May 15, 1967, Order. *Id.* at 876. The Circuit Court directed this Court to supplement that earlier decree to include the specific requirements of *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir.1969). In *Singleton*, the Fifth Circuit required school districts subject to desegregation orders to regularly re-examine their transportation systems to insure the provision of such services in a "non-segregated and otherwise non-discriminatory fashion." *Id.* at 1218. This Court included this *Singleton* requirement in its July 2, 1971, Order.

Defendants point out that, despite the requirement of a non-discriminatory system, the Court did not impose any obligations on Defendants to monitor or ameliorate any busing "burden." Defendants emphasize that the desegregation plan actually imposed a greater transportation burden on black students because black schools were ordered closed or converted and by necessity, those children had to be transported elsewhere.

Plaintiffs raised this issue when Defendants initially proposed the desegregation plan and the Court addressed Plaintiffs' concerns. In the July 2, 1971, Order, the Court explained that implementing the desegregation plan would likely result in disproportionate busing of black students. However, the Court noted that, although proportionately more black students would be bused, the plan would result in the busing of fewer students overall, and that the alternative to the

plan--maintaining the formerly black schools--would require the transportation of large numbers of white students, with the possible result of " 'white flight' or 'black flight' or both."

The Court's orders have not been amended to deal with disproportionate burden on black students and Defendants cannot be charged with a duty that has never existed. Moreover, Plaintiffs agreed to the continuation of the transportation burden in the 1991 Consent Order. It would be unfair to require Defendants to monitor and /or account for the respective burdens associated with the transportation of students when such requirement was not a part of the desegregation order or subsequent orders. Furthermore, because Defendants must take whatever steps are necessary to affirmatively desegregate the schools to the maximum extent possible until unitary status is declared, specifically with regards to student assignments, the disproportionate burden will continue. Defendants shall continue to provide transportation on a non-discriminatory basis. Nevertheless, Defendants should continue to consider the burdens imposed by transporting all students when decisions are made regarding student assignments and site selection.[49] Plaintiffs' objections to the Magistrate ***1327** Judge's findings with regards to transportation are overruled.

D. Extracurricular Activities

Plaintiffs also object to the Magistrate Judge's finding that extracurricular activities provided in the Hillsborough

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[49]Defendants must remain cognizant of the correlation between site selection and the burden imposed on black students. While Defendants have noted the intention to reduce busing, if not enough facilities are being built in the inner-cities, black children, in particular, will require continued busing. These types of choices should be discussed openly between the parties.

County school system are unitary. Primarily, Plaintiffs complain that Defendants fail to collect and maintain data as to each school in the system. Plaintiffs argue that, because Defendants have only provided evidence regarding athletics as opposed to all of the various other activities, there is insufficient information upon which to make a determination of unitary status.

There is no dispute that the Court did not impose any numerical or other requirements by race in connection with the participation of extracurricular activities. (T4 at 166-67). Defendants assert that, although they do not maintain data reflecting extracurricular participation by race by school, they do track participation in the district overall. The data compiled for 1995 reveals that black students made up 11% of the membership of national honor societies, 12% of drama clubs, 27% of student councils, 20% of marching bands, 21% of other bands, 14% of orchestras, and 19% of choral groups. (PX 1 at 27). The Court agrees with the Magistrate Judge that Defendants offer and maintain extracurricular activities on a non-segregated and otherwise nondiscriminatory basis. However, as Defendants aggressively employ desegregation techniques over the next few years, the Court expects that the representation of minorities in these various activities will continue to improve.

E. Resource Allocation

Plaintiffs argue that, overall, the data on resource allocation is so deficient that it is of little probative value. Plaintiffs assert that the data suffers from three (3) major deficiencies: (1) none of the data provided hereto is compared with information prior to the issuance of the 1971 Order; (2) only two (2) years of data are provided and not consecutive years; and (3) the analysis does not take into consideration the impact of the Middle School Plan. Plaintiffs argue that a

comparison of resources allocated prior to 1971 is necessary in order to properly evaluate the prior *de jure* segregated school system and the vestiges of that system that remains today. Moreover, Plaintiffs argue that two (2) years of data does not provide sufficient reliable information to evaluate. Finally, Plaintiffs contend that, because the Middle School Plan involves a tremendous overhaul of the entire school system, the two (2) years of data used by Defendants is unreliable.

In addition, Plaintiffs argue that the teachers' resource information does not convey an accurate picture. Plaintiffs point out that the teachers' resource information includes resources, provided as a result of Chapter I funds. Chapter I funds provide significant resources based on the socioeconomic status of the students. (T7 at 93-95). As a result, Plaintiffs argue that, the inclusion of these Chapter I funds without indicating how this support affects the amount of resources can be misleading. Therefore, according to Plaintiffs, this is not a reliable indicator of how the school district actually distributes its resources.

Furthermore, Plaintiffs explain that the operational analysis includes information on teacher salaries and benefits, textbooks, instructional equipment, maintenance, and other categories. *See* (DX1 at 16-19). However, Plaintiffs assert that, because only two (2) years of data were provided, a dozen schools were excluded from the analysis on supplies and equipment expenditures. As a result, Plaintiffs assert that Defendants' data is unreliable.

Conversely, Defendants argue that the analysis provided by Dr. Armor is sufficient. Dr. Armor compared the allocation of teacher resources between schools having black enrollments greater than 40% and schools having black enrollments less than 40%. Defendants explain that the availability and distribution of funds is controlled to a large extent by state law

and/or administrative regulation. The funds needed to operate the schools come from three (3) sources: (1) the federal government; (2) the State of Florida; and (3) local revenues. Defendants contend that, with regards to operations, the state money received by Defendants is distributed according to a weighted formula based on the numbers and educational types of students ***1328** enrolled during a given fiscal year. (T1 at 186). Defendants emphasize that both the state and federal governments audit Defendants to ensure that funds provided to the Hillsborough County schools are expended for the activities and programs for which they are provided and on an equitable basis. (T1 at 190-91; 195-96).

Defendants point out that the sample which was used demonstrates that the allocation of resources and expenditures was comparable for all schools regardless of whether the school was greater than or less than 40% black. With regards to teacher resources, Dr. Armor focused on expenditures for instructional salaries, instructional supplies, and for all purposes. (DX1 at 16-19). In the 1992-1993 school year, per capita expenditures for instructional salaries for elementary schools which had black enrollments in excess of 40% were slightly lower than expenditures for other schools. However, these expenditures were slightly higher for junior high schools which had black enrollments of 40% or higher. (DX1, Chart 37). For the 1994-1995 school year, the expenditures were slightly higher at schools with black enrollments below 40% than schools with black enrollments exceeding 40%; however, the differences were not remarkable. (DX1, Chart 40).

In the area of expenditures for instructional supplies and equipment, the evidence showed that these expenditures were slightly higher for elementary and junior high schools with black enrollments below 40% for both years examined. (DX1, Charts 38, 41). Defendants maintain that these differences were attributed to conversion funds distributed to schools which were

newly constructed or reconfigured pursuant to the Middle School Plan. Defendants assert that most schools with 40% or more black enrollments were not scheduled for conversion until the 1996-1997 and 1997-1998 school years; therefore, the amounts distributed will be similar upon their conversion.

Moreover, according to Defendants, all of the resources with regards to instructional supplies and equipment are distributed on a per pupil basis to all schools, based on programmatic needs. (T7 at 192-95). Defendants explain that the only exception to this method of distribution is that schools which are converted to different grade configurations pursuant to the Middle School Plan are afforded additional monies, which while computed on a per pupil basis, are only available to those schools undergoing conversion. (T7 193-94).

Furthermore, with regards to total per capita expenditures, Defendants' analysis showed that in the 1992-1993 school year, the expenditures were very similar for elementary schools, regardless of racial composition, and expenditures were higher in the junior high schools which were 40% or more black. (DX 1, Chart 39). In the 1993-1994 school year, elementary schools that were over 40% black received higher per capita distributions, while junior high schools were nearly identical, regardless of racial compositions. (DX1, Chart 42).

Dr. Armor also reviewed capital expenditures on a five (5) year basis (1991 to 1995) because capital expenditures are "one-time costs, spread over two or more years." (DX 1 at 19). The expenditures were examined on a per school basis, comparing expenditures on inner city schools, which were comprised of the highest concentration of black students, with other schools. The analysis demonstrated that expenditures on inner city schools exceeded those on other schools. (DX 1, Chart 43).

Furthermore, Defendants explained that in addition to monies received from state and local sources, schools having certain levels of students receiving free and reduced lunches are eligible for federal monies, which may be used only at qualifying schools. (T7 at 93-96); (DX 37); (T1 at 190-91). These qualifying schools include many of the over 40% black schools. Defendants stress that this additional money is used to reduce class sizes and/or provide additional social and psychological services, as determined by the individual schools. (T7 at 95).

Defendants' distribution of teacher and financial resources reveals no pattern of discrimination and Plaintiffs' objections are overruled thereto. However, as the School Board continues to implement the Middle School Plan and to make adjustments pursuant to this Order, the School Board shall continue to evaluate its resource allocations. ***1329** Moreover, the School Board should provide Plaintiffs with records of resource allocations for each year following this Order until unitary status is declared. The parties shall confer and attempt to agree on the substance and format of those records.

F. Facilities

Plaintiffs object to the Magistrate Judge's determination that the school system is unitary with respect to facilities. Plaintiffs assert that "[D]efendants' site selection policies and practices suggest that the placement and construction of new facilities have exacerbated racial identifiability." (Br. in Supp. of Pls.' Obj. to R & R at 32). Plaintiffs contend that Defendants failed to provide any documentation concerning: (1) the reasons a particular school site was selected; (2) a summary analysis of the impact of a selected site on desegregation; (3) alternative sites which were considered and rejected; and (4) the reason for rejecting an alternative site, including consideration of the alternative sites' impact on desegregation.

Plaintiffs contend that it is clear from Defendants' own data that they did not address racial identifiability when schools were opened and closed. For example, Plaintiffs point out that, from 1977 through 1995, twenty-four (24) elementary schools were opened and eight (8) elementary schools were closed. During this period, there were fourteen (14) racially identifiable schools which had black populations of 40% or more. (PX1 at 8). Plaintiffs emphasize that, despite the opening and closing of several elementary schools over the years, none of the fourteen (14) racially identifiable schools were further desegregated by Defendants' decisions. Plaintiffs argue that, Defendants have not merely lost desegregation opportunities, but have actively promoted segregation in the community.

Conversely, Defendants assert that they have taken care to ensure that their actions in site selection and school construction do not cause a return to a dual system. Defendants emphasize that the School Board has not built any new schools since 1971 which entailed an all-white or majority black enrollment. Moreover, Defendants maintain that, despite the fact that most of the new construction has taken place in the suburbs, the School Board has also expended a substantial portion of its capital funds on construction and remodeling projects for inner city schools, some of which have opened as magnet schools to foster desegregation.

There is no question that the location of new schools has an immense impact on the community as a whole. The Supreme Court has repeatedly articulated the import of such decisions.

> The construction of new schools and the closing of old ones are two of the most important functions of local school authorities and also two of the most complex. They must decide questions of population growth, finances, land values, site availability, through an

> almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.

Swann, 402 U.S. at 20-21, 91 S. Ct. 1267.

As discussed above, Defendants have failed to aggressively combat segregation. Unfortunately, Defendants' shortcomings with regards to student assignments may have contributed to the fact that more schools are needed in the predominately white suburbs. Undoubtedly, it is impossible to determine the precise effects of the School Boards' decisions over the past twenty-seven (27) years on the residential patterns in Hillsborough County. However, Defendants' lack of good faith commitment over the years, in conjunction with Defendants' decisions to build the majority of new schools in the areas of white suburban expansion farthest from the areas with concentrated black populations, causes this Court concern. Moreover, Defendants' position that they were not required to take affirmative action, once the initial system of ***1330** nondiscriminatory attendance patterns was implemented, undermines their contentions that they have not contributed to the racial identifiability of Hillsborough County schools.

Nevertheless, the Court finds that Defendants' evidence demonstrates that the opening and closing of schools has generally maintained or improved racial balance. *See* (DX 3

and DX 4). While the Court expects additional documentation to be provided on this subject when unitary status is considered in the future, the Court is not inclined to become further entangled in the complex educational policies involved in new school construction and school abandonment decisions.[50] Instead, the Court will afford Defendants the opportunity to demonstrate that state-imposed segregation no longer exists.

In addition, the parties addressed the issues concerning overcrowding. Plaintiffs argue that, not only has the School Board selected sites in predominately, if not exclusively, white neighborhoods, but there is evidence that schools which are twenty (20) percentage points above the district-wide black population are more likely to be overcrowded than any other Hillsborough County schools. However, as noted above, Plaintiffs' evidence regarding FISH capacities does not include portable classrooms; therefore, schools that exceed their FISH capacities are not necessarily overcrowded. Notwithstanding, the use of portable classrooms is relevant to the inquiry of the equality of school facilities. While a school may not be "overcrowded" because of the extensive use of portable classrooms, the fact that brand new schools are being built elsewhere should be evaluated. Defendants shall make this evaluation and demonstrate that new school construction decisions have taken into consideration the discrepancies

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[50]The Court expects Defendants to provide Plaintiffs with sufficient information so that the decisions made by the School Board, with regard to construction and abandonment of schools, can be adequately evaluated. Plaintiffs have already articulated the documentation which they believe is necessary. However, since the parties will be working very closely to insure that a unitary school system is forthcoming, the Court finds it unnecessary, at this point, to define the parameters of the communication between the parties on this topic.

between the use of portable classrooms at racially balanced and unbalanced schools.

G. Quality of Education

With regard to quality of education, Plaintiffs argue that socioeconomic factors do not adequately explain the disparity in academic achievement levels among black and white students. Plaintiffs argue that Defendants' evidence is insufficient and the differences in achievement levels demonstrate vestiges of the prior *de jure* segregated schools system.

Significantly, the Court's orders contain no specified levels of student achievement, nor any standard to evaluate quality of education. To a large extent, the quality of education being provided in Hillsborough County must be scrutinized in connection with the other factors which the Court has previously reviewed, particularly in connection with the facilities provided and the allocation of resources. In addition, however, the parties have generally agreed on several areas of the Defendants' operations which should be addressed in regards to judging the equality of educational opportunity being afforded to students. These include dropout rates, suspension rates, gifted child education programs, and academic outcome.

As discussed above, Defendants need to evaluate certain facets of the school system with regards to the equality of facilities. Moreover, Defendants shall provide Plaintiffs with the documentation necessary so that productive discussions and negotiations between the parties can ensue. With regards to resource allocations, there is no indication that the Defendants have violated the Fourteenth Amendment and this area merely needs to be monitored by Defendants as they continue to implement the desegregation plan, as well as, the Middle School Plan. No further discussion is required on these issues.

(i) *Dropout Rates*

Both Dr. Armor and Dr. Stevens addressed dropout rates at the evidentiary hearing. Although Plaintiffs did not present *1331 any independent evidence on the subject, they take issue with analyses conducted by Dr. Armor relating to academic outcomes, but not to the use of that factor. Dr. Stevens notes that black students drop out of school at rates disproportionate to their presence in the general student population. (PX 1 at 31-32). Similar to the issues concerning suspensions, Dr. Stevens does not allege a discriminatory basis for this result, but calls for increased monitoring, and, a different method of record keeping. *Id.* at 32.

Significantly, Defendants monitor dropout rates, and they maintain a program designed to reduce the number of dropouts, without regard to race. That program is multifaceted, including several components. One is the Personalized Education Program ("PEP"), which is based in the elementary schools, and focuses on academic interventions in the areas of reading, math, and skills development. (T7 at 206-07). In middle and junior high schools, Defendants endeavor to predict which students are at risk of dropping out and again focus on academic skills by using teachers with lower pupil to teacher ratios. (T7 at 207). Additional counselors and teachers are provided at senior high schools. *Id.* Moreover, prospective dropouts are assigned either on a voluntary basis or by administrative action to alternative schools. *Id.* As with suspensions, the defendants monitor dropouts and report them monthly to principals, with the expectation that they will follow up as part of a "dropout retrieval program." *Id.* As a result of these efforts, Defendants' dropout rates are the lowest in the state for districts of its size. (T7 at 208-09).

Dr. Armor presented an analysis of the differences in dropout rates between black and white students. Under this

analysis, and after controlling for the socioeconomic status ("SES") factors of free lunch eligibility and family structure, virtually all of the gap between black and white statistics is explained. (DX 1 at 24 and Chart 54). Even if adult education students are included within the dropout statistics, nearly three-fourths of the difference is explained, and the predicted difference between black and white rates is 3%. *Id.* Plaintiffs' objections to the Magistrate Judge's findings are overruled.

(ii) *Suspensions*

With regards to student suspensions, Dr. Stevens notes that black students are suspended from school for disciplinary purposes at a rate which is disproportionate to their presence in the school population. Dr. Stevens also notes that the rate of suspension was two (2) to four (4) times as high for black students as for whites from 1991 to 1994. However Plaintiffs do not cite these statistics as necessitating a conclusion that racial discrimination has occurred. Indeed, Dr. Stevens testified that they are not unusual. (T4 at 145). Nevertheless, he expressed concern over the obvious fact that a suspension deprives the disciplined student of the educational opportunities which are provided during the term of the suspension. (T4 at 145-46). Additionally, Dr. Stevens suggested that the data demonstrates the need for further analysis by Defendants to ensure that they do not result from discriminatory treatment. (PX 1 at 29-30).

Defendants have been monitoring the suspension rates in Hillsborough County. In fact, the data relied upon by Dr. Stevens was collected by Defendants, who track suspensions and expulsions, by sex, race, and age. (T7 at 234). The suspension rates in Hillsborough County are slightly below State of Florida averages "for some groups." *Id.* Significantly, there is no evidence to suggest that the disproportionate

suspension rates are the result of discrimination by Defendants. Consequently, Plaintiffs' objections in this regard are overruled.

(iii) *Gifted Program*

In addition, both parties agree that gifted child education should be reviewed as well. As discussed below, Defendants implemented a program ("Plan B") in 1993 to facilitate admission of disadvantaged students to the gifted programs. *See* (T2 at 151). The standard for admission to gifted programs offered by the Defendants is a tested IQ of at least 130. This requirement is set by the State of Florida for that part of the program and is referred to as "Plan A." (T2 at 153). Previously, Defendants could not deviate from this prerequisite. (T2 at 155-56). However, in 1991, the State allowed school ***1332** districts to formulate plans for "Plan B," which was designed to facilitate admission of disadvantaged students to the gifted programs. (T2- 151). Participation in Plan B is voluntary. (T2-153). Defendants elected to participate in Plan B as soon as it was allowed, completing their plan and obtaining state approval in 1993. (T2-151). Plan B allows students with an IQ of 115, demonstrated academic achievement, and certain personal characteristics to be admitted to the same program in which those with the higher IQ are enrolled. (T2 at 154). Nevertheless, prior to Plan B, the State standard for gifted class admissions was applied without regard to the race of the student. (T2 at 156-57).

As of October 1996, gifted programs in Hillsborough County included 8,219 white students (74.5%), 1,015 black students (9.2%), 1,249 Hispanic students (11.3%), 481 Asian students (4.0%), 71 Indian students (less than 1%), and 27 multi cultural students (less than 1%). (T2 at 151-52). Dr. Stevens notes that while black enrollment district-wide is 23%, black students constitute only 9% of those children enrolled in the Defendants' gifted education programs. (PX1 at 30).

Moreover, Dr. Stevens reported that 9.2% of all white children have been assessed as gifted, whereas, only 2.9% of the black students in the county have been so classified. (PX 1 at 30). Dr. Stevens emphasized that white students are three (3) times more likely than black students to be identified as gifted. *Id.* Significantly, Dr. Stevens admitted that these figures do not evidence racial discrimination, however, he does suggest increased scrutiny. The Court agrees that there is no indication that student placement is connected to race, and, consequently, Plaintiffs' objections to the Magistrate Judge's findings with regards to the School Board's gifted programs are overruled.

(iv) *Academic Outcome*

Dr. Armor examined several factors relating to academic outcomes, including achievement test scores, outcomes for seniors, and school effects. Data relating to Hillsborough County students demonstrates that there are differences between the achievement test scores of black students and their white counterparts. However, these results are not unique to Defendants' school system. Nationally, achievement gaps between students of the two (2) races range from two-thirds to four-fifths of a standard deviation, depending on the test in question and the grade level of the students taking it. (DX 1 at 21).

The results of tests administered to fifth grade students in Hillsborough County in 1994 and 1995 produced a gap of 16 to 17 points between black and white students. This difference represents approximately three-fourths of a standard deviation, which is consistent with the national statistics cited by Dr. Armor. (DX 1 at 22). In addition, Dr. Armor analyzed the data just- described, and controlled for certain SES factors. The particular factors which Dr. Armor used were poverty level (using free lunch eligibility), number of parents in the household, average income, and parent education level. When

he performed this analysis on the fifth grade students who took the tests in 1995, controlling for the identified SES measures, 60% of the gap between the races was explained. (DX 1 at 23 and Chart 46). Dr. Armor also controlled for SES factors while adding the test takers' first grade reading test results as a proxy for the level of preparedness of students upon beginning their schooling. He was able to explain some 90% of the gap between the scores of whites and blacks using this analysis. (DX 1 at Chart 47).

Using the same methods for the 1994 school year, Dr. Armor obtained similar results. (DX 1 at Charts 48 and 49). In Dr. Armor's opinion, these findings show that race does not predict lower achievement test results for black Hillsborough County students. However, Plaintiffs' expert, Dr. Robert Crain, took exception with Dr. Armor's analysis. Nevertheless, when Dr. Crain used the same control factors as Dr. Armor, his results were substantially similar. (T6 at 265-66).

Dr. Crain questioned Dr. Armor's use of first grade reading scores, and the source of other factors Armor used. In his initial report, Dr. Crain questioned Defendants' use of first grade reading scores on the basis of their "notorious" unreliability. (PX 3 at 1). At the hearing, however, Dr. Crain did not ***1333** rely on this criticism, focusing instead on the impropriety of these scores as a control because they do not demonstrate initial skills prior to schooling. (T6 at 162-63). Notwithstanding, Dr. Crain conceded that a child's characteristics at the beginning of his or her education do affect performance. (T6 at 243-44). Dr. Crain performed an analysis using only the variables of free lunch and two (2) parents. (T6 at 266). This study produced a predictive line of regression which is parallel to that of Dr. Armor's study, indicating a similar effect. Although Dr. Crain conducted this analysis, he did not produce these results for the Court. *Id.* Neither did he

test the statistical significance of any differences between his analysis and that of Dr. Armor. (T6 at 270).

Although Dr. Crain's concerns are understandable, he has not provided a rational basis for rejecting Dr. Armor's analysis. The use of neighborhood data could be replaced only through individual surveys of each family. While the factors used by Dr. Armor might themselves be affected by race, Dr. Crain does not explain how this possibility is any more impairing when using income, the use of which Dr. Crain criticizes, than for poverty, the use which he does not criticize.

Dr. Crain also objected to Dr. Armor's use of a single model, combining black and white students, believing that separate models were more appropriate. (T6 at 176-77). Dr. Armor testified that earlier studies used two models based on differences in the educational outcomes of the two (2) races, but more recent studies have not disclosed such a difference and therefore rely on single models. (T7 at 182-84). Significantly, Dr. Crain's two (2) models did not produce different results.

Dr. Armor also examined reading achievement of black students based on the racial makeup of their schools. (DX 1 at 26 and Chart 56). Dr. Armor found that a gap between these students and their white counterparts existed, even when the black children attended schools which were less than 40% black. Dr. Armor's analysis also found that black students who attended such schools scored two (2) points lower than black students at schools with over 40% black populations. However, when the analysis controlled for SES variables, the gap disappeared. *Id.*

Dr. Crain criticized these portions of Dr. Armor's findings as well, but this was based on his use of a different type of statistical analysis, described as a "one-tailed test." Ordinarily, a "two-tailed test" is used to analyze a sample of

data. The tails refer to the two halves of a bell curve which predict the outcomes of the test. A one-tailed test eliminates all outcomes which fall in one half of that curve. Dr. Crain admitted that the use of the one-tail model is allowable only when the tester has an independent basis for predicting outcomes. (T6 at 273).

In this case, Dr. Crain justified the use of that model by stating that "no one in his right mind" would expect a black child to perform better academically in a school which is more than 40% black. (T6 at 274). Significantly, Dr. Crain did not provide any basis for this belief; therefore, there is no basis for using the one-tailed analysis. Dr. Armor testified to studies showing that blacks can, in fact, perform better academically in an all-black school when compared with their integrated counterparts. (T7 at 161- 62). Indeed, within the "tail" which Dr. Crain eliminated from his analysis, were examples of black children who outperformed their counterparts in schools with lower black populations. Robles, which has the highest percentage of black students, falls exactly where statistically predicted. (T7 at 165). Interestingly, Dr. Crain testified that, even using the one-tail model, he found no difference between student achievement on math tests by fifth graders who attended schools that were more than 40% black. (T6 at 281-82). Clearly, Plaintiffs' argument that there is a possibility of race-based differences between the quality of education Defendants provide to black students in reading, but not in math, is illogical.

Defendants have tracked the educational achievement of its students, by race, on several occasions over the last nineteen (19) years, and continue to do so. (T2 at 147). Black students in Hillsborough County outperform black counterparts nationally and in the State of Florida on Scholastic Assessment Tests taken by 47% of all seniors. (T2 ***1334** at 141). Black students in the county also outperform other black students in

the State on the standardized test required for graduation. *Id.* Additionally, Defendants have performed their own analysis of the impact of attendance at the over 40% black schools upon black achievement. After controlling for SES variables, no impact was found, which result was consistent with Dr. Armor's analysis. (T2 at 143).

The Court finds that the educational programs in Hillsborough County are provided on a fair and equal basis to students of all races. Although some differences in academic performance exist between black and white students depending on their race, these differences are the result of socioeconomic factors unrelated to the schools. While this discrepancy is unfortunate, it is not the result of segregation nor evidence of vestiges of a prior *de jure* system. In *Swann*, the Supreme Court articulated the limitations of the courts' remedies.

> We are concerned in these cases with the elimination of discrimination inherent in the dual school systems, not the myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds. The target of the [desegregation cases] was the dual school system. The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage.

Swann, 402 U.S. at 22-23, 91 S. Ct. 1267. Plaintiffs' objections with regards to the quality of education provided by Defendants are overruled.

III. Conclusion

"[T]he court's end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." *Freeman*, 503 U.S. at 489, 112 S. Ct. 1430. The Court does not wish to supervise the School Board any longer; however, supervision remains necessary. The Court believes that this case is nearing its completion, but there is more work to be done. Nevertheless, the Court anticipates that "unitary status" will be achieved over the next few years.

Contrary to the parties' submissions, they are not as divided and polarized as it appears. Unfortunately, the inherent nature of the adversarial process encourages litigants to emphasize and accentuate their differences. Notwithstanding, the parties should be able to work together to achieve unitary status within a few years. Significantly, the 2000 census will soon be available to the parties which will provide updated data which will add to the understanding of the circumstances in Hillsborough County, specifically with regards to the Middle School Plan being implemented.

Unitary status is not a concrete concept and involves management of innumerable issues. It is not always black and white. One non-quantitative factor of particular significance is whether the School Board has sufficiently demonstrated good faith compliance with regards to both the operation of the educational system in general and the implementation of the Court's desegregation orders. At this point, Defendants have failed to show that further oversight is no longer necessary to avoid an imminent return to the unconstitutional conditions that led to the Court's intervention.

As discussed above, the Court finds that Defendants have failed to demonstrate a good faith commitment to the Court's desegregation orders. Unfortunately, this lack of good faith taints the analysis of the other facets of the school district's

operations. Because some of the schools in the system are racially identifiable, there is a presumption that the racial identifiability is traceable to the prior *de jure* system. Because Defendants have not fully embraced their affirmative duty, Defendants have not desegregated the school district to the maximum extent practicable. The relevance of good faith is that it conveys the notion that unitariness is less of a quantifiable moment in the history of a desegregation plan than it is the general state of successful desegregation. With each instance of a failure or refusal to fulfill their affirmative duty, Defendants have continued to violate the Fourteenth Amendment. As a ***1335** result, the Court is compelled to retain jurisdiction.

It is very difficult in a case such as this to categorize different aspects of the school system and declare individual areas unitary. Especially because the Court is convinced that Defendants' failure to demonstrate a good faith commitment has continued the constitutional violation and has diminished the availability of effective remedies. Clearly, Defendants need to address the issue of student assignments. Because of the passage of time and the construction and abandonment of schools, there are limitations on what can be accomplished. Nevertheless, Defendants have various desegregative techniques available and have the benefit of evaluating the techniques employed in other school districts. The School Board should not have to be told what to do at every turn; Defendants must be willing to take the reins. The School Board should initiate affirmative desegregation policies and practices to demonstrate that supervision by the Court can cease. By working with Plaintiffs to achieve unitary status, the parties can avoid unnecessary polarization and accomplish the task at hand relatively quickly.

After evaluating the voluminous record in this case, the Court is convinced that Defendants have a short road to travel.

Essentially, Defendants need to demonstrate that they are willing to aggressively desegregate the school district to the maximum extent practicable. Defendants should evaluate desegregation tools that have been successful in other districts and determine whether they can be effectively employed in this school district. Secondly, Defendants need to provide Plaintiffs with the necessary documentation so that Plaintiffs can conduct independent analysis and provide input with regards to desegregating the district. While Defendants are not bound to implement any policies or procedures that Plaintiffs may recommend, the insight into Plaintiffs' perspectives will prove to be invaluable. Moreover, Defendants should document and chronologize the affirmative steps taken from the date of this Order.

The school district has changed a great deal since this suit was filed. Hillsborough County enjoys a diverse population which includes people of every race and national origin. The concept of unitary status should likewise account for the change in Hillsborough County's change in demography. Neither the county nor the concept of unitariness can be confined to black and white issues. It is questionable whether the 80/20 ratio remains as an appropriate a starting point. For instance, in 1990, approximately 14% of the school-aged population was considered to be of Spanish descent. (DX 2 table 1). Moreover, approximately 5% were classified as "other." *Id.* However, the parties failed to address these significant variables. Defendants bear the burden of proof. Accordingly, it is

ORDERED that the Magistrate Judge's Report and Recommendation (Docket No. 809) be adopted in part and rejected in part; Defendants have failed to prove that the racial imbalances in the school system are not traceable, in a proximate way, to vestiges of past discrimination; Defendants have failed to demonstrate a good faith commitment to this Court's desegregation orders; the Hillsborough County public

school system is not unitary; Defendants remain subject to the Court's 1971 desegregation Order and the 1991 Consent Order; Defendants shall discharge their duties consistent with this Order; Plaintiffs' Motion to Enforce (Docket No. 753) is DENIED as moot; and jurisdiction is retained.

Report and Recommendation of Magistrate Judge
August 26, 1997

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ANDREW L. MANNING, et al.,

Plaintiffs,

v. **Case No. 58-3554-CIV-T-17C**

THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA (formerly BOARD OF PUBLIC INSTRUCTION OF HILLSBOROUGH COUNTY, FLORIDA), et al.

Defendants.
_____/

REPORT AND RECOMMENDATION

Before the Court is the issue of whether the public school system of Hillsborough County has attained unitary status and should be released from court supervision. This issue has been referred to the undersigned Magistrate Judge for evidentiary hearing and a report and recommendation.

BACKGROUND

When this lawsuit was filed in 1958 on behalf of black school children, the public school system of Hillsborough County maintained racially segregated schools and black and white pupils were not permitted to attend the same schools. During the next thirteen years various methods were employed

to desegregate the schools, at the Court's direction, and appeals from those orders consumed much of that time.

In May 1971 the Court found that these methods had failed to desegregate the schools and ordered the School Board to immediately implement a plan to bring the school system in compliance with the Constitution. Since July 1971, the Hillsborough County School Board ("School Board") has operated under this Court's desegregation orders. The desegregation plan implemented by defendants and approved by the court and plaintiffs shifted focus in 1991 when the School Board adopted a middle school plan and the Court, with the consent of the parties, entered a Consent Order which modified the 1971 Order particularly as to student assignments within a group or "cluster" of schools.

In 1994, plaintiffs filed a motion contending that defendants had violated the terms of the July 1971 Order and 1991 Consent order by allowing certain schools to become "racially identifiable." The motion was referred for a report and recommendation. Following an evidentiary hearing, the undersigned Magistrate Judge recommended denial of plaintiffs' motion to enforce court order for failure to establish a violation of the Court's orders.

On November 17, 1995, this Court deferred ruling on the report and recommendation, noting that the dispute involved in plaintiffs' motion to enforce focused on student assignment. The Court found that the parties' discussion of the issue "demonstrates the need to expand the scope of the inquiry to a full fledged determination of whether the Hillsborough county school system has in fact achieved unitary status." (Order Recommitting Matter to Magistrate, Dkt. 709, at 3) ("Order of Referral") The Court ordered:

> a showing by Defendants as to whether they have complied with this Court's 1971 Order regarding the factors set forth by the United States Supreme Court in Green v. New Kent County School Bd., 391 U.S. 430 (1968). In addition to student assignments, Green ;and Freeman require that faculty and staff assignments, transportation, extracuricular activities, facilities and resource allocation all be free from racial discrimination. In each of these areas, the school board bears the burden of showing that any current imbalance is not raceable, in a proximate way, to the prior constitutional violation of the of Plaintiffs' rights. Freeman, 503 U.S. at 494. The quality of education being received by all students and the good faith commitment by the School Board must be shown.

Following the referral order, the undersigned Magistrate Judge set a hearing on the unitary status determination and thereafter conducted monthly status conferences with counsel for the parties. The parties exchanged discovery and retained expert witnesses.

After the evidentiary hearing was transcribed, the parties filed proposed findings of fact and conclusions of law (Dkts. 796 and 797) which were supplemented after the filing of the 6th Annual Report to the Consent Order. (Dkts. 803 and 805) Closing arguments were presented on May 22, 1997.

For the following reasons, it is recommended that this Court find that the public school system of Hillsborough County has attained unitary status in that defendants have eliminated, to the extent practicable, the vestiges of the prior de jure segregated school system and have complied in good faith with this Court's orders.

Pursuant to the referral order, the following proposed findings of fact and conclusions of law are submitted[1].

FINDINGS OF FACT

1. This action was filed on December 12, 1958 on behalf of plaintiff Andrew Manning[2].

2. The Court initially dismissed the complaint for the plaintiffs' failure to exhaust administrative remedies, but the dismissal was reversed by the court of appeals, which remanded the case for further proceedings. See Mannings v Board of Public Instruction, 277 F.2d 370, 375 (5th Cir. 1960) ("Mannings I").

3. Following remand, the Court conducted a non-jury trial, after which, on August 21, 1962, the Court entered an order finding that the defendants were in fact maintaining an unlawfully segregated system of public schools. To remedy the violation, the Court enjoined the defendants from operating a racially discriminatory school system and allowed them until October 30, 1962, in which to file a comprehensive plan for the desegregation of the schools.

4. For approximately the next nine and one-half years, this Court issued various orders and the School Board devised

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[1]Some of the findings set forth in this Report and Recommendation have been stipulated bo by the parties (Dkt. 767) or are taken from the prior Report and Recommendation ("Prior R and R") dated June 23, 1995 (Dkt. 699) which addressed plaintiffs' Amended Motion to Enforce Court Order (Dkts. 601, 602). Record cities are not provided for stipulations.

[2]At the unitary status hearing, Mr. Manning revealed that his name had been misspelled as "Mannings" in court documents.

various desegregation Hillsborough County's schools. See Mannings v. Board of Public Instruction of Hillsborough County, 306 F. Supp. 497 (M.D. Fla. 1969) ("Mannings II"), rev'd, Mannings v. Board of Public Information, 427 F. 2d 874, 875, (5th Cir. 1970) ("Mannings III").

5. On May 11, 1971, the Court entered an order directing the School board to prepare and implement a comprehensive plan for desegregating the Hillsborough County School system. (May 1971 Order, Dkt. 636 at 43) (hereafter "May 1971 order").

6. The Court's May 1971 Order (at 43-44) directed that:

> (a) The plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county now having a school population at least 50% black.
>
> (b) In preparing the plan the school board shall begin with the proposition that a white-black ratio of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation.

7. On July 2, 1971, this Court approved for implementation the plan of desegregation developed and submitted by the School Board (hereafter "July 1971 Order") In the July 1971 Order, the Court expressly retained jurisdiction "for such further action as may be necessary and required."

8. The 1971 plan was designed to desegregate student enrollment in grades 1-12, as required by the Court; it did not include kindergarten classes, to which students continue to be

assigned on a neighborhood basis, nor did it include pre-school (early childhood education) classes.

9. The 1971 plan required the conversion of twelve formerly all-black elementary schools in the "inner city" area of Tampa[3] to single-grade attendance centers serving the 6th grade.

10. Under the 1971 plan, each elementary grade-level (1-5) attendance area of each of these formerly all-black elementary schools was subdivided into between two and five "satellite areas"; students residing in each of these "satellite areas"[4] were assigned to attend a formerly white school, to which they were transported for grades 1-5.

11. Under the 1971 plan, Lee Elementary School was to serve grades 1-5. The attendance area established for Lee Elementary School in the 1971 plan was not modified by the School Board prior to the 1975-1976 school year.

12. On January 14, 1975, this Court entered an Order which recited that:

> The latest of [the annual enrollment] reports was filed with the Court December 10, 1974. It indicates that because of changes therein there is a need for, and the

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[3]Bryan, Carver, College Hill, Cuesta, Dunbar, Jackson Heights, Lomax, Meacham, Orange Grove, Potter, Shore and Williams.

[4]A satellite zone is an area which is not contiguous with the main attendance zone for a school. May 11, 1971 Order, p. 29, n.41. Thus, the references throughout the record to a satellite denotes a group of students within a given geographic area in a school boundary zone who are transported or assigned to a school outside the boundary zone primarily for desegregation purposes.

> Board is directed to file with the Court on or before March 21, 1975, a supplemental plan designed to insure that the requirements of the Court's previous orders insofar as they relate to Lee Elementary School will be complied with as of the beginning of the 1975-76 school year.

13. The Court also directed the defendants' attention to Cleveland, DeSoto, and Gary Elementary Schools "in the event changes for other schools are required . . . ." Edison Elementary, which was 41% black at that time, was not mentioned.

14. On March 21, 1975, the School Board submitted to this Court a supplemental plan. This plan proposed to convert Lee to a 6th-grade center replacing the Meacham facility and to reassign the former attendance area of the Lee School under the 1971 plan among seven different elementary schools for grades 1-5. The plan also projected racial enrollments for Cleveland, DeSoto, and Gary Elementary.

15. This Court, by Order of June 3, 1975, directed implementation of the supplemental plan for Lee Elementary School commencing with the 1975-76 school year.

16. The 1975 annual report filed by the defendants reflected no majority black schools. Five out of 128 schools had black student enrollments of 40% or more--Cleveland, Edison, Gary, Graham, and Palm River Elementary. (DX 7) Neither the Court nor the plaintiffs took any action as a result of those racial enrollments.

17. The following year, Cleveland experienced an increase to 55% black enrollment. (DX 7)

18. At least since January 14, 1975, the Court has not directed the School Board to prepare a supplemental plan or to

take any action with respect to the racial composition of any of its schools, including but not limited to schools whose enrollments were more than 50% black.

19. Subsequent annual reports filed by the defendants reflected increased black enrollment at several schools. These reports were served upon the plaintiffs each year. No motion seeking relief or enforcement of any obligation imposed by the Court was ever filed by the plaintiffs until June 1994.

20. The 1993 annual report for the 151 schools operated by defendants indicated that there were nine elementary schools and one junior high school with black student enrollments of 50% or more;[5] there were five elementary schools and two junior high schools with black student enrollments of 40% or more.[6]

21. Each year following initial implementation of the 1971 plan, the School Board filed at least two reports with the Court, copies of which were served upon counsel for the plaintiffs. The first report (usually submitted in the fall) provided enrollments (by race and grade) and faculty assignments (by race) at each school facility operated for grades 1-12 in the system. The second report enumerated changes in student assignment (if any) proposed to become effective in the following school year.

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[5]The elementary schools were Cleveland (59%), Edison (74%), Foster (57%), Graham (63%), Meacham (50%), Oak Park (66%), Robles (90%), Sulphur Springs (70%), and Witter (56%). The junior high school was Van Buren (50%).

[6]The elementary schools were Cahoon (47%), Clair Mel (48%), DeSoto (40%), Shaw (48%), and West Tampa (41%). The junior high schools were Dowdell (46%) and Sligh (43%).

22. The reports of proposed student assignment modifications included, but were not limited to, boundary changes in response to overcrowding and student assignment modifications necessitated by the construction of new schools. The reports included projections of anticipated enrollments, by race, at schools affected by the proposed changes.

23. At least since January 14, 1975, this Court has not directed the School Board to prepare a supplemental plan or to take any action with respect to the racial composition of any of its schools, including but not limited to those schools in which the percentage of black students attending those schools exceeded 50%.

24. For more than 22 years after the 1971 desegregation plan was implemented, plaintiffs filed no written objections with this Court concerning the actual or projected enrollments of any schools in Hillsborough County, including-schools whose enrollments were more than 50% black. In June 1994 plaintiffs filed their first written objections to projected racial enrollments for the 1994-95 school year.

25. Plaintiffs did object in 1980 (for reasons other than anticipated racial composition of enrollments) to the closing of George Washington Junior High School and Glover Elementary School, proposed actions which were approved by this Court after a hearing on plaintiffs' objections.

26. Plaintiffs also objected in 1990 (for reasons other than anticipated racial composition of enrollments) to the proposed conversion of the Blake 7th-grade center to a magnet high school, a proposal which this Court disapproved (without prejudice to its subsequent resubmission as part of a comprehensive restructuring plan) by Order of January 23, 1991.

27. In November 1989, Dr. Walter L. Sickles, then Superintendent, appointed a "Task Force to Modify Single Grade Centers" to investigate and make recommendations for reorganizing the Hillsborough County school system to establish middle schools consistent with the goal of retaining a desegregated school system.

28. Beginning in early 1991 a series of meetings was held between the Superintendent and other School Board representatives and plaintiffs' counsel and desegregation expert, Dr. Leonard Stevens. The purpose was to discuss the proposed middle school plan.

29. In early 1991, then-Assistant Superintendent James D. Randall had an initial meeting with counsel for plaintiffs. A more extensive meeting took place on March 15, 1991, attended by counsel for the parties, Superintendent Sickles, Mr. Randall and other staff members of the school district, as well as by plaintiffs' educational and desegregation consultant, Dr. Stevens.

30. On March 15, 1991 plaintiffs' representatives were furnished a copy of the "Proposed Cluster Plan," which described working concept of middle school reorganization then being considered by the Task Force.

31. Further meetings were held between May and July 1991 regarding the plan. Following the July 16, 1991 meeting, a formal report entitled "Middle School Task Force Report 3, July 1991," was submitted to and approved by the School Board and subsequently transmitted to plaintiffs' counsel on August 20, 1991.

32. The Middle School Task Force Report 3 was attached to and made a part of the Consent Decree executed by

counsel for the parties, which was approved and entered by this Court on October 24, 1991 as a Consent Order.

33. The "cluster plan" is currently beginning its sixth and final year of implementation. Of the 17 clusters, eleven have been implemented so far. There are six remaining clusters to be implemented at the beginning of the 1997-1998 school year.[7]

34. Prior to the Court's 1995 Order of Referral, the School Board had not requested a finding of partial or full unitary status by the Court and/or the vacating, in whole or in part, of the previous orders of the Court.

35. The Court has therefore not had occasion to make, nor has it made, a determination whether all vestiges of the prior racially discriminatory dual school system in Hillsborough County have been eliminated to the extent practicable.

STUDENT ASSIGNMENTS

Background

36. The Hillsborough County school system, one of the largest school districts in the country, enrolled approximately

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[7]A more detailed description of the middle school plan and discussions between the parties concerning the proposed plan is contained in the Prior R and R at 29-31.

120,000 students in the 1995-1996 school year.[8] DX 7 at 28.[9]

37. As of October 30, 1995, there were a total of 148 public schools operated by the School Board: 108 elementary schools, 27 junior high (or middle) schools, and 15 senior high schools. 5th Annual Report, April 15, 1996 at 54-82.

38. There is no dispute that all of the schools in Hillsborough County were desegregated as of the 1971 - 1972 school year.

39. Plaintiffs acknowledge that most of the schools currently operated by defendants reflect the relative percentages of black and white residents in Hillsborough County. (Dkt. 796 at 12)

40. The controversy centers on what factors have caused some of the schools--particularly the elementary schools--to have an increasing number of black students enrolled over the years.

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[8]Although the Court now has the benefit of the 6th Annual Report filed on April 15, 1997 providing data for the 1996-1997 school year, this data was not available for the most part at the October 1996 unitary status hearing. The 6th Annual Report is addressed in the parties'~supplemental submissions. (Dkts. 80, 805)

[9]9Reference to the parties' exhibits at the unitary status hearing are indicated by the letters "PX" or "DX" followed by the exhibit number. References to the seven-volume transcript are indicated by the letter "T" followed by the volume number and page number, e.g., T7 at 107.

41. None of the Court's prior orders have expressly or implicitly"[10] directed defendants to **maintain** a particular student race ratio at any school, or to take any action in response to increased black enrollments in the schools.

42. In determining the degree of racial imbalance in individual schools, both Dr. Stevens, plaintiffs' desegregation expert, as well as Dr. Armor, defendants' desegregation expert, applied a working definition of plus or minus 20 basis points over the district-wide race ratios, using the 80/20 ratio outlined in the May 1971 Order as a benchmark. (DX 1 at 7; PX 1 at 5)[11]

43. Plaintiffs' 1994 motion to enforce focused on sixteen schools, mostly elementary, with a black student enrollment of 40% or more. Those schools and the percentage of black students attending those schools as of the 1995-96 school year[12] are Robles Elementary (90%), Edison Elementary (75%), Sulphur Springs Elementary (74%), Oak Park Elementary (70%), Graham Elementary (67%), Foster Elementary (610), Cleveland Elementary (57%), Shaw Elementary (56%), Witter Elementary (54%), Cahoon Elementary (52%), Clair Mel Elementary (49%), West Tampa Elementary (47%), DeSoto Elementary (43%), Van Buren Junior High (53%), Sligh Junior (50%), and Dowdell Junior High (49%).[13]

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[10]See Prior R and R at pages 15, 34-38.

[11]"This Court's 1995 referral order declined to adopt a specific figure in determining racial identifiability and instead stated that the determination is dependent on local conditions.

[12]Data from the 1995-96 school year was utilized at the evidentiary hearing conducted in October, 1996.

[13]The student population statistics for all of these schools are taken from data set forth in DX 7, which consists of the annual

44. Each of the sixteen schools named by the plaintiffs was predominantly white in 1971 following implementation of the desegregation order. (T1 at 33)[14]

45. In the intervening twenty-five years since the 1972-1973 school year, the percentage of black students attending these schools has increased to 40% or more.

46. The percentage of black students in each school as of the 1972-73 school year was as follows: Robles Elementary (24%), Edison Elementary (36%), Sulphur Springs Elementary (19%), Oak Park Elementary (23%), Graham Elementary (35%), Foster Elementary (21%),

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student assignment reports filed by the School Board. The information about boundary and other attendance changes filed by the School Board. The information about demographic changes is taken from the report of Dr. William A.V. Clark, the defendants' demographics expert, which report was introduced as DX 2.

The data for the boundary and other attendance changes, including their effect on the racial composition of student populations, along with the data on demographic changes, for the sixteen schools about which the plaintiffs complained in 1994 (with the exceptions of DeSoto Elementary and Sligh Junior High) are summarized in Appendix A submitted by the defendants with their proposed findings of fact and conclusions of law. This same data (with the exception of demographic data) is summarized for all other schools (including DeSoto and Sligh) in Appendix B submitted by the defendants. An exhibit introduced at the hearing, the defendants summarized the boundary and other attendance changes made to the sixteen schools about which the plaintiffs complained in 1994 and the projected and actual effects of those changes on student race ratios within the schools. (DX 2; T1-21)

[14]The 1972-73 school year is the earliest year after the 1971 Order for which complete figures are available.

47. These sixteen schools were also the primary focus of the testimony at the unitary status hearing.

Boundary Changes In General[15]

48. Since the 1977-1978 school year, the School Board has made more than 300 modifications in student assignments to relieve overcrowding, to accommodate the opening of newly constructed facilities, or for other reasons. With a few exceptions, none of these boundary changes were made **solely** for the purpose of affecting the racial ratio of a school.[16]

49. In addition, the School Board has accommodated enrollment increases, overcrowding, kindergarten classes, and special program needs by locating or relocating portable classrooms on individual school campuses. Between the school years from 1985-1986 through 1993-1994, the number of portable classrooms used in the Hillsborough County school system increased from approximately 800 to approximately 1200.

50. When making assignment changes to relieve overcrowding or to accommodate new construction, the School Board has taken into account the racial enrollments within the

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[15]Most of the findings in this section have been stipulated to by the parties. (Dkt. 767 at 18-20).

[16]As the record demonstrates, on some occasions the School Board changed student assignments at certain of the schools which now have black student enrollments of 40% or more in order to improve racial balances. (See DX 3)(Dkt. 796, App. A) However, these changes were infrequent and were usually made inconjunction with some other factor such as relieving overcrowding or when a new school was opened.

new boundary and the effect of the boundary changes on the enrollment ratios at the affected schools.

51. In addition, in making assignment changes to deal with problems of overcrowding or with new school construction, the district where practicable reassigned or divided and partially reassigned existing satellite zones (those originally created in 1971) in a manner that moved enrollments toward the system-wide ratio.

52. In particular, when the School Board constructed a new facility in a suburban area having a small resident black student population within the contiguous zone created surrounding the facility, it would utilize the reassignment of pre-existing satellite zones to increase the number of black students assigned to the new facility.

53. In modifying student assignments to relieve overcrowding or in connection with the opening of a new facility, the School Board has since the 1975-1976 school year created non-contiguous zones or satellites in at least seven instances.[17] In most, but not all of these instances, students reassigned on a non-contiguous basis were being transported to their former school of assignment before the change.

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[17]These seven instances, and the schools involved, are:

1977-78	Cahoon and Temple Terrace
1980-81	Mort and Cahoon
	Bellamy and Dickenson
1983-84	Dickenson and Bay Crest
1984-85	Dickenson and Town & Country
1986-87	Greco Jr. High and Burns Jr. High
1992-93	Mort/Tampa Palms and Hunter's Green

54. The School Board has never created a new non-contiguous or satellite zone solely for the purpose of altering the racial enrollment ratio at a school, including schools that had majority black enrollments. [18]

55. Since 1986, the School Board has not initiated boundary changes (not otherwise being considered for reasons such as overcrowding or the opening of a newly constructed school facility) for the purpose of altering the racial enrollment ratio at a school, including at schools that had majority-black enrollments.

56. In summary, the School Board's goal since 1971 has been to maintain a desegregated school system. This goal included having the ratios at individual schools come as close to the district-wide ratios as possible. For those schools which experienced increases in the numbers of black students attending the schools, the School Boards would remove a satellite assigned to those schools if it was no longer necessary to maintain racial balance. However, the School Board did not create new satellites for schools with increasing black enrollment as a way to reduce the racial imbalances because of the disruption that would. have on the families and children attending those schools. (T7 at 219-21)

Student Enrollments and Demographics

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[18]This stipulation is understood to refer to satellite attendance zones created **subsequent** to the desegregation of the Hillsborough public schools which was achieved during the school year 1971-1972. Those created for that year wee at the express direction of the Court when the formerly black schools were closed and the students attending those schools were reassigned to other schools.

57. Each of the sixteen schools named by the plaintiffs was predominantly white in 1971 following implementation of the July 1971 order. (T1 at 33)

58. The parties have examined demographic data for Hillsborough County to determine whether changes in residential housing patterns may explain why there is a higher percentage of black students at certain schools than existed in the past.

59. The most recent demographic data available for this inquiry is derived from the Decennial United States Census conducted in 1990. Since the Census is conducted only every 10 years and no special census has been taken in the interim, the 1990 Census figures provide the most up-to-date data available.

60. From 1970 to 1980 the total population of Hillsborough County, Florida, rapidly increased from 490,265 persons in 1970 to 626,960 persons in 1980. The total population in 1990 increased substantially again to 834,054. (DX 2 table 1) The percentage increase of the total county population was approximately 30 percent during 1970-1980; the percentage increase during 1980-1990 "inner city" neighborhoods, this area experienced a loss of about 21,000 white persons and a gain of about 4,000 black persons between 1970 and 1990. (DX 2 at Table 4; T2 at 23)

65. Census data shows that the number of tracts in Hillsborough County with black populations of 95 percent or more decreased substantially from seven in 1970 to two in 1990. At the same time, the number of tracts with populations of 25% to 50% black residents more than doubled from 1970 to 1990. (T4 at 61; PX 2 at 18) Tracts with populations of 50% or more black residents have expanded about 40 percent over the twenty-year period. (T2 at 34)

66. During the period 1971 to the fall of 1995, the percentage of black high school students increased from 14% to 21%. During the same period the percentage of black junior high students increased from 20% to 23%. At the elementary level, the increase was from 21% to 24% black students. (PX 1 at 4-5)

67. Census information for the tracts having public schools with black student enrollments of 40% or more (thirteen elementary schools and three junior high schools) generally shows these schools as located within areas where the number of black residents is increasing relative to the number of white residents of those tracts. (T2 at 56)[19]

68. While noting that in 1970 it "was possible to maintain a large number of schools with black enrollments of less than 40 percent," Dr. Clark concluded that the increased proportion of black residents "in the neighborhoods north of the Hillsborough River and east of 22nd Street after 1980 and the continuing overall white student losses from inner city areas made it impracticable or impossible to make further attendance zone adjustments in order to maintain racial balance within the plus or minus 20 percent band." (DX 2 at 9)

69. The evidence indicates, among other things, that for the school year 1990-1991 the disparity between census information and enrollment was not substantial at most of the schools identified at the hearing which have black student enrollments of 40% or more. Shown below is the percentage of black enrollment at a school, followed by the 1990 census

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[19]Appendices 1,2 and 3 to this Report and Recommendation incorporate demographic sixteen schools with black student enrollment of 40% or more. (DX 2, Tables 1, 4 and 5)

information of black residents age 0 to 17 living in the attendance zone (shown in **bold**): Robles Elementary (86%, **71%**), Edison Elementary (69%, **70.5%**), Sulphur Springs Elementary .(62%, **51.6%**), Oak Park Elementary (61%, **56.8%**), Graham Elementary (68%, **42.9%**), Foster Elementary (46%, **52.4%**), Cleveland Elementary (52%, **41.4%**), Shaw Elementary (38%, **33.8%**), Witter Elementary (45%, **41.1%**), Cahoon Elementary (38%, **33.5%**), Clair Mel Elementary (41%, **55.1%**), West Tampa Elementary (44%, **31.6%**), Van Buren Junior High, (42%, **39.6%**), and Dowdell Junior High (42%, **39.6%**). (Dkt. 796, App. A)[20]

70. Dr. David Armor, a well recognized expert in school desegregation cases,[21] studied the sixteen schools with a black student population of 40% or more against the background of post1972 boundary changes effected for those schools and the census data gathered by Dr. Clark. (T3 at 33-48; DX 1) He noted that only a "handful" of schools (15 out of a total of 135 schools) have been or are currently out of balance. (T3 at 54)

71. None of the current or past racial imbalances in county schools are attributable to school board action, including boundary changes, but rather are attributable to demographic changes, according to Dr. Armor. (T3 at 53)

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[20]DeSoto Elementary and Sligh Junior High School were not included in Dr. Clark's demographic study of 1990 census information. (DX 2) Black student enrollment for the 1990-1991 school year was 50% at DeSoto Elementary and 35% at Sligh Junior High. (Dkt. 796, App. A and B)

[21]Dr. Armor has always testified in favor of school boards at unitary status hearings. (T3 at 118)

72. Dr. Armor concluded that defendants have implemented "a highly effective desegregation plan that virtually desegregated the entire district to a very high degree of desegregation, as high as I've seen anywhere in this country but especially in the south, and that it maintained that plan for a very long time." (T3 at 49)

73. Dr. Fred Shelley, plaintiffs' demographics expert, did not conduct any demographic studies of his own, but relied on Dr. Clark's data in drawing some differing conclusions. (T4 at 50-56) Dr. Shelley agreed that both the inner-city areas identified by Dr. Clark and the neighborhoods surrounding those areas had experienced an increase in the percentage of black residents over the past twenty years. (T4 at 81-83) But he did not think that demographics could totally explain the dramatic increases in black student enrollment at some schools. (T4 at 51-56; 56-58)

74. Dr. Shelley concluded that "it is perhaps difficult to conclude that increase in racial imbalance is attributable solely to the processes of natural demographic change." (T4 at 56, 66) While agreeing that the most recent demographic data available is from the 1990 census, Dr. Shelley had reservations about drawing conclusions about present student enrollments based on that data. (T4 at 106)

75. Despite differing with the conclusions drawn by Dr. Armor, Dr. Shelley was unable to provide an alternate hypothesis for the increased black enrollment at the sixteen schools targeted by plaintiffs and studied by Dr. Armor. (T4 at

95) Dr. Shelley conceded that only ten boundary changes had occurred after the schools became imbalanced. In some of the schools [22]

76. Also, Dr. Shelley apparently erroneously assumed that Dr. Clark's demographic data included children attending a school as part of a satellite attendance zone. (T4 at 91) The presence of a satellite could cause that school to have a racial balance which might seem disproportionate to the racial balance in the school attendance area. (T4 at 91-92) He also agreed that in a highly segregated area it is more difficult to adjust boundaries or make other changes without substantial disruption including transportation. (T4 at 78)

77. Evidence presented at the hearing by the School Board included the percentage of black students at the schools before each attendance change and the percentage of black students at the schools after the change. However, it is undisputed that whenever the School Board proposed an attendance change, it estimated the projected attendance figures, including the percentage of black and white students for these

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[22]Defendants' Appendix A and B (Dkt. 796) summarize evidence as to boundary changes and the race ratios before and after the boundary changes for each school in Hillsborough County during the period of court supervision. Many of the sixteen schools identified by plaintiffs as racially unbalanced have not had many boundary changes in recent years. For example, Cahoon has had no boundary changes since 1989 when its black student enrollment was 34%. Edison's last boundary change was 1982 when it was 500 black. Fosters last boundary change was in 1984 when it was 29% black. Oak Park has had no changes since 1978 when it was 41% black. Robles last had a boundary change in 1976 when it was 30% black. Shaw and Sulphur Springs have not had boundary changes since 1989 when they were 37% black and 59% black, respectively. (App. A)

schools. (DX 3, 7; T1 at 23) In most instances when an attendance change was made, the School Board expected the change to improve the race ratio at the affected school and, those times when the change did not improve the ratio, the School Board expected the ratio to change by only a few percentage points. (DX 3, DX 7) Occasionally, the projection did not hold because the demographics of the affected area changed unpredictably. (T1-23)

78. If demographic factors explain the racial imbalances at those schools, it is unnecessary to reach the issue of what further desegregative techniques could be employed as this Court has never required defendants to adjust racial enrollments at Hillsborough County schools on an annual basis.

79. Notwithstanding the evidence pointing to demographic change as the most likely explanation for the increased black enrollment at thirteen elementary schools and three junior or middle schools, certain factual issues raised by plaintiffs should be addressed.

80. Dr. Shelley examined five of what he called the "long unbalanced" schools--Cleveland, Edison, Graham, Robles, and Oak Park--and noted that the attendance areas for these schools do not adjoin each other. He testified that it was at least "plausible to be able to make some slight adjustments in the boundaries of these attendance areas and reassign some students such that the degree of racial imbalance is lessened in those schools." (T4 at 64)

81. It must be remembered that the disparity in racial enrollments was also present, albeit to a lesser degree, when plaintiffs and the School Board approved the clusters as part of the middle school plan adopted by this Court in the 1991 Consent Order. (Prior Report and Recommendation at 29, 32 and n.22) Since the. implementation of the clusters, actual black

enrollment has exceeded projected enrollment for some schools.[23]

82. Testimony received at the 1994 hearing on plaintiffs' motion to enforce court order demonstrated that at least as to West Tampa Elementary, reassignment of students according to suggestions made by plaintiffs' desegregation expert, Dr. Stevens, was not practicable.[24]

83. Plaintiffs have presented proposed findings addressing some of the sixteen schools which currently have 40% or more black student enrollments in terms of their location in clusters with other schools which have a much lower percentage of black student enrollments. (Dkt. 796 at 18-19)

Edison Elementary

84. Edison Elementary School (75% black)[25] is in a cluster with Morgan Woods (10% black), Town & Country (27% black) and Woodbridge (21% black). (PX 7 at 2)

85. However, these elementary schools are not in the area immediately adjoining the Edison attendance zone. Rather, the schools which immediately adjoin the Edison attendance

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[23]A chart prepared by Dr. Stevens compares the race ratios projected by the 1991 middle school plan and actual race ratios in 1995 for the schools having black student enrollments of 40% or more. (PX 1, Ex. le)

[24]See Prior R & R at 38-40.

[25]The racial enrollments listed in plaintiffs' exhibit are based on the 1995-96 school year.

zone are Foster (64% black), Broward (35% black), and Seminole (40% black). (DX 8 at 4)[26]

Cleveland Elementary

86. Cleveland Elementary School (52% black) is in a cluster with Carrollwood (15% black), Forest Hills (27% black) and Lake Magdalene (12% black). (PX 7 at 2) Forest Hills does adjoin the Cleveland attendance zone at the northwest corner but its boundaries include a portion of Florida Avenue and Busch Boulevard, major city streets. The other schools do not. The other schools surrounding Cleveland are Seminole (40% black), Sulphur Springs (80% **black), and Foster** (64% black).

Sulphur Springs Elementary

87. Sulphur Springs (74% black) is in a cluster with Twin Lakes (17% black). (PX 7 at 2; DX 7 at 18, 20)[27] However, Twin Lakes does not adjoin the Sulphur Springs attendance zone. The elementary schools which do adjoin the Sulphur Springs attendance zone are: Shaw (59% black), Cahoon (55% black), Foster (64% black and Cleveland (53% black).

Graham Elementary and Foster Elementary

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[26]The racial enrollments shown on defendants' exhibit are from the **first month** attendance figures for the 1996-97 school year and so they differ somewhat from the percentages shown in PX 7 as well as other exhibits which may be in evidence, including the 6th Annual Report which is the most current data in the record for the 1996-1997 school year.

[27]Students who attend Sulphur Springs and Cleveland also attend Adams Middle School. (PX at 7)

88. Plaintiffs also point out that Graham (67% black) and Foster (61% black) are in a cluster with Broward (34% black), Egypt Lake (22% black), Mendenhall (30% black), and Seminole (37% black). (PX 7 at 3; DX 7 at 3, 7-9, 13, 17)

89. With the exception of Seminole, which is to the southwest of the Foster attendance zone (divided by 12th Street), none of the other schools which adjoin Foster are under 40% black. Instead, Foster is bordered by Sulphur Springs (80% black), Cahoon (55% black), and Edison (78% black). (DX 8 at 5) Also, the dividing line between the attendance zones for Graham and Broward is Indiana Street. Graham is also divided from Tampa Bay Boulevard Elementary (27% black) by the Hillsborough River. (DX 8 at 6)

Robles Elementary

90. Robles (90% black) is in a cluster with Folsom (29% black). (PX 7 at 3; DX 7 at 8). While the Folsom attendance area adjoins Robles to the east, the two zones are separated by a CSX railroad track. Also, the other attendance areas surrounding Robles are Riverhills (45% black) and Cahoon (55% black). (DX 8 at 9)[28]

Cahoon Elementary

91. Cahoon (52 % black) is in a cluster with Hunter's Green Elementary School (19% black). (PX 7 at 3; DX 7 at 9) Hunter's Green is not an adjoining school zone, however.

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[28] In 1975 or 1976 the School Board considered converting Robles to a sixth-grade center as a way to reduce the increased black enrollment at the school. However, after talking to the parents in the Robles neighborhood, the School Board dropped that idea because the parents who lived in that area were opposed to it. (T7 at 220)

Instead, Cahoon is adjacent to Witter (55% black), Temple Terrace (34% black), Riverhills (45% black), Robles (88% black), Foster (64% black), Sulphur Springs (80% black) and Shaw (59% black). (DX 8 at 1)

Shaw Elementary and Witter Elementary

92. Shaw (56% black) and Witter (54% black) are in a cluster with. Tampa Palms Elementary School and two other elementary schools to be built after the 1995-1996 school year. (PX 7 at 3) Tampa Palms Elementary School is 14% black. (DX 7 at 19) Although a satellite attendance zone for Hunter's Green adjoins both the Shaw and Witter attendance zones (DX 8 at 9, 12), there is no indication that the Hunter's Green attendance zone adjoins either Shaw or Witter and that would be unlikely since, by definition, a satellite attendance zone is a non-contiguous attendance zone.

Oak Park Elementary

93. Plaintiffs' proposed findings do not address Oak Park. Its attendance zone is adjoined by the attendance zones for Palm River, DeSoto, and Kenly, all of which had a black enrollment of 35% or more for the first month of the 1996-1997 school year. (DX 8 at 8)

94. Dr. Stevens testified at the unitary status hearing that he had "not drawn any plan for any particular school" for reducing the percentage of black students at the schools which have a black student enrollment of 40% or more. (T4 at 206)[29]

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[29] Dr. Stevens is also an expert in school desegregation cases. He has never testified on behalf of a school system, however, or in favor of a declaration of unitary status as to student assignment. (T4 at 154)

Magnet Schools and Programs

95. Magnet programs are one of the most effective desegregation techniques employed by school boards today.

96. When the Court approved the Consent Order in 1991, a key objective of the Middle School Plan was to locate magnet programs in the inner city schools where the greatest number of black students reside. Today, all ten elementary school programs are located in neighborhoods which consist primarily of black residents. (T1 at 177)

97. As suggested by its name, the magnet program or school offers a special curriculum which is designed to attract students based on their special interests. Students who attend magnet programs are provided transportation if needed. (Ti at 173-74) For the 1996-1997 school year, defendants offered twelve magnet programs. Three additional magnet programs will be offered for the 1997-1998 school year. (T1 at 143)

98. Mary Ellen Elia, director of the School Board's magnet school program, estimated that by the time the program is fully implemented, almost 90,000 students will be participating in magnet programs in Hillsborough County. (T1 at 170) All of the magnet programs and schools opened so far have been successful. (T1 at 154)

99. The School Board actively markets its magnet programs, including advertising in the media. The staff responsible for the magnet programs also meet with community groups across the county. (T1 at 144-50)

100. As there are more applicants than openings in the programs, lists of students are made by computer random draw. Students are then selected based on gender, ethnicity, and grade

level. Gender and ethnicity are used as selection criteria to achieve a balanced population. (DX at 10) Also, applicants living closes to the school are given priority in at least some situations.[30] (T1 at 162)

101. In order to obtain federal funding for the magnet school program, the School Board had to establish that it would foster desegregation and attract substantial numbers of students of different racial backgrounds.[31] Under the School Board's plan, students who are members of a minority group can comprise up to 40% of the students participating in the magnet programs or attending magnet schools. (T1 at 166) That percentage was chosen because it represents the total percentage of students within the school system who belong to a minority group. (Dkt. 808, Affidavit of Mary Ellen Elia) ("Elia affidavit")

102. The magnet school plan also specifies the percentage of particular minority groups within the 40% cap who may be admitted under the plan: 23% Black; 14% Hispanic; 2% Asian Pacific Islanders; and .02% American Indians. (T1 at 166)

103. The percentage figure of 23% for black student enrollment was part of the Middle School Task Force Plan. Plaintiffs and defendants agreed to this figure as part of their negotiations. However, the Plan also provides that if students from other minority groups do not apply for the magnet

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[30] Hillsborough County has both magnet programs and magnet schools. It is not clear from the testimony whether students applying for magnet programs also receive first priority if the live closest to the schools. (T1 at 161-64) 30

[31] See 34 C.F.R. § 280.1 et. seq. (1996).

programs, black students may be accepted into the programs as long as total black enrollment does not exceed 40%. (Elia affidavit at 3-4)

Special Transfer Requests
Including majority to Minority Transfers

104. The Court's July 1971 Order set out specific criteria the School Board was to follow in handling requests to transfer students from one school to another. (July 1971 Order, at 11, Ex. 2) The Court has not altered the School Board's obligations since that time.

105. The only grounds authorized for transfers are: (1) majority to minority transfers; (2) transfers recommended by the juvenile court; (3) transfers for exceptional children; (4)transfers for children of School Board teachers and staff to their parents' place of employment; (5) transfers to attend Tampa Bay Vocational-Technical High School; and (6) transfers in cases of severe hardship after determination of each case by the School Board.

106. Transfers under (3),(5), and (6) can be approved by the School Board only after considering recommendations from the BiRacial Committee. They are to be considered without regard to race except transfers are not to be approved if made for the purpose of avoiding desegregation. Transfers under (1) and (4) are to be reported to the Bi-Racial Committee.

107. Majority to minority ("M to M") transfers allow a student to transfer from a school in which his race is in the majority to attend the closest school to his residence in which his race is in the minority. Transportation is to be provided if the school to which a student is transferred is more than two miles from the student's home.

108. It appears that no M to M transfers have ever been sought from the School Board. (T1 at 90-91) Although parents were generally familiar with the special transfer requests, they did not seem familiar with M to M requests. Dr. Miliziano, the Superintendent's Administrative Assistant, testified that not until recently did the School Board start evaluating special assignment requests made on other grounds to determine whether the children seeking the transfer would be eligible for an M to M transfer. The transfer request forms now have a request for the race of the student to be listed. The transfer requests sought on other grounds are granted if the request would qualify as an M to M request. (T1 at 90-92)

109. The M to M transfer program is now publicized as a result of a recommendation by School Board staff in July 1995. (PX 14) Since the policy has been publicized there have been no specific M to M transfer requests. (T1 at 106)

110. Dr. Stevens, plaintiffs' desegregation expert, would like to see the School Board do more marketing of the M to M transfer program but agreed that use of the M to M transfers would not make a big difference in alleviating racial imbalances. (T4 at 195)

111. Dr. Stevens studied other types of special transfers and concluded that defendants' granting other transfer requests had increased the racial imbalances at seven of the imbalanced elementary schools for the year 1995. His study indicated that the percentage of black students enrolled in those schools (Cahoon, Cleveland, Foster, Graham, Robles, West Tampa, and Witter) experienced increases ranging from five to seven percent as a result of special assignments allowing students to attend those schools who are not really assigned to them. (T 4 at 129-30) (PX 1 at 13)

112. This issue was addressed at the prior hearing on plaintiffs' motion to enforce court order. In effect, Dr. Stevens believes the Court should reconsider its prior directive to the School Board to grant transfers for extreme hardship "without regard to race" if the effect of that policy would be to contribute to racial imbalance. (PX 1 at 12-13) For the reasons stated previously, for this Court to order defendants to deny black parents severe hardship transfers for their children because the transfers would adversely impact race ratios is neither practical nor wise. (Prior R and R at 24-26)

113. No evidence was presented that the School Board has failed to follow the Court's directives as to special assignments.

FACULTY AND STAFF ASSIGNMENTS

114. For the 1993-1994 school year, 14% of the teachers in Hillsborough County were black. For the same year, blacks constituted 17% of the principals, 22.2% of the assistant principals, and 7.9% of the district administrators (at the main school board office). of the noninstructional permanent personnel, 16.1% were black. Black teacher aides comprise 25.3% of the total teacher aides employed by the county.[32] (T2 at 132-135)

115. According to Marilyn Whittner, Director of Human Resources, the School Board has "a dearth of minority applicants for our teaching positions and we are constantly seeking minority teachers." (T2 at 105) The School Board

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[32]Defendants used district-wide employee data from the 1993-1994 school year at the unitary status hearing. (T2 at 134)

focuses recruitment efforts at colleges with a substantial percentage of black graduates.

116. Additionally, a mentoring program has been instituted for black teachers who aspire to be administrators. More than one-half of the graduates of that program have been placed in administrative or teacher resource positions. (T2 at 108-09; PX 14)

117. For instructional and non-instructional personnel, the principal at an individual school interviews prospective applicants and is authorized to make offers contingent on approval by School Board and staff. Principals are given criteria for open positions. If Human Resources determines that a new hire would adversely affect the racial ratio at a particular school it will disapprove the offer unless no qualified candidates are available. (T2 at 112-16)

118. Instructional personnel employed by the School Board are represented by a union which negotiates salaries based on the level of service and academic degree held by the employee. These salary levels are applied across-the-board to all teachers. (T2 at 11415)

119. There are currently no schools in which black teachers or staff constitute a majority at any school nor has that situation existed in the past since the 1971 Order was entered. (DX 7)

120. The parties' experts differ on whether some schools are racially identifiable due to their faculty and staff compositions. Using a 15% deviation standard, Dr. Stevens identified twelve elementary schools which are not in compliance with the districtwide ratio. However, Dr. Armor, defendants' expert, did not find any schools which fit into this category. This is because Dr. Armor used only faculty data; Dr.

Stevens used data from the annual reports which aggregate faculty and staff and include non-certified personnel. (T4 at 139) However, the 14% figure cited by defendants referred only to black faculty, not staff. (T2 at 130, 132)

121. None of the Court's orders have ever required the School Board to provide racial balance at the upper management level. However, plaintiffs note the paucity of upper-level black administrators during the time the School Board has operated under court supervision. During this period, only one of the six Assistant Superintendent positions has been held by a black individual: Assistant Superintendent of Support Services. (T7 at 145-47)

122. Defendants have never been found liable for racial discrimination in employment based on records which have been maintained since at least 1977. Some complaints have been resolved at the administrative stage. (T7 at 199-200)

123. The School Board has in place grievance procedures which can be utilized by parents and students as well as employees and includes various levels of review, including a public hearing before the School Board. Student handbooks distributed to every student at the start of the school year outline these procedures. (T7 at 201-04)

124. Dr. Samuel Horton, an educator with the School Board between 1977 and 1991, served as General Director of Secondary Education where he helped develop guidelines for the gifted program among other programs. He noted the absence of any blacks in assistant superintendent positions during that time. Dr. Horton, who is African American, stated that he applied twice for the position of Assistant Superintendent for Instruction but was not selected either time. While he did not file a grievance, Dr. Horton testified that he believed he was not selected due to his race. (T6 at 88-96; 103)

125. Ann Porter, head of the Tampa branch of the NAACP, testified about concerns about black males being denied employment opportunities and other complaints she receives.[33] Ms. Porter, who is African American, meets with the Superintendent and staff on the average of once or twice a month. This working relationship has become stronger with the current Superintendent, Dr. Earl Lennard. Although she is opposed to a declaration of unitary status at this time, Ms. Porter admitted that many complaints are resolved through these informal meetings. (T6 at 139-41)

TRANSPORTATION

126. With regard to transportation of students, the School Board's obligation has been to insure that bus routes and assignment of students to buses "assures the transportation of all eligible students on a non-segregated and otherwise nondiscriminatory basis" and to regularly re-examine its transportation system. (July 1971 Order at 10)

127. In 1996, the School Board transported approximately 80,000 students daily. It is the fifth largest school district in the nation in terms of the numbers of students transported. (T1 at 123) For the 1994-95 school year, the School Board received over $17 million in state funding for transportation. (DX 24)

128. As required by Florida law, any student attending a school two or more miles from his residence must be furnished transportation by the school district. (DX 21) The

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[33]Ms. Porter was not asked about a venture between theUniversity of South Florida and the School Board launched inAugust 1995 to place black male teachers with the School Board after graduation. (DX 14, "Project PILOT" documents)

School Board has always complied with this requirement. (T1 at 122-25)

129. The School Board provides transportation for all students who qualify and no distinctions are drawn as to race. (T1 at 13133)

130. The desegregation technique adopted in the 1971 Order involved closing the formerly all-black schools and assigning them to "satellite" attendance zones. (T4 at 135-36)

131. The School Board has maintained data on the number of students transported annually and their race. For the 1995-96 school year, approximately 18,400 students were transported for desegregation purposes including students attending magnet schools. (PX 1 at 20)

132. Of this number, more black students than white students were transported at each of the three school levels: elementary, middle, and high school. (PX 1 at 20)[34]

133. At no time after the 1971 Order was entered did plaintiffs raise any objection about the number of students bused, including when the desegregation plan was modified in the 1991 Consent Order due to implementation of the middle school plan.

134. Part of the reason for adopting the Middle School Plan was to allow students to attend schools close to their homes as much as possible. (T1 at 65)

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[34]Of the elementary students transported 23% were black and 10% were white. At the middle school level 26% were black and 18% were white. Of the high school students, 24% were black and 8% were white. (PX 1 at 20)

135. Although the 1971 Order did not require provision of transportation for after-school activities, the School Board provides "activity buses" for after-school activities to afford students living in satellite areas (a non-contiguous attendance zone area) the opportunity to participate in those activities if they were not able to provide their own transportation. Because the junior high schools are being phased into middle schools which are "self-contained" in their activities, the activity buses are primarily used at the high schools. (T1 at 123-30) Activity buses are provided for any students who need to stay after school for any reason, and are not limited to athletics or clubs. (T1 at 138-41)

136. In 1989 the School Board examined whether providing only one activity bus per satellite area met the needs of the students. The superintendent and his staff determined that more than one activity bus per school might be needed on certain days due to the number of activities and events scheduled at the schools. (DX 23) 137. This policy was implemented and remains in effect today. The School Board supervisor of transportation surveys schools on a weekly or daily basis to determine the number of buses needed. (T 131-36; 138-41)

EXTRACURRICULAR ACTIVITIES

138. Under this Court's desegregation plan the School Board has been ordered to regularly, re-examine its extra curricular activities to insure that they are maintained and operated on a non-segregated and non-discriminatory basis. (July 1971 Order at 10)

139. In the fall of 1971 the Hillsborough County school system was integrated in its athletic programs and all students, regardless of race, were given an equal opportunity to participate in athletics. (T1 at 112-13)

140. Since that time, a committee composed of the athletic director and assistant school principals has regularly reviewed proposed changes in the athletic programs pursuant to policies adopted by the School Board. The School Board offers a number of athletic programs, ten for females and ten for males. (T1 at 11315)

141. Athletic activities are offered at each senior high school and existing junior high school. They have been eliminated at the middle schools as part of the restructuring program and due to funding. The director of athletics hopes to provide athletic programs at the middle schools in the future. (T1 at 114-15; 119-20)

142. Of total student participation in athletics, approximately 23% of the athletes were black and approximately 77% were white for the school year 1996-97. Participation varied from school to school and sport to sport. For example, total participation in basketball for black students was 54% (males) and 49% (females). On the other hand, participation by blacks on high school swim teams was very low. Only three black students (one female, and two males) participated on high school swim teams. Over 18% of the cheerleaders were black. (DX 28; T1 at 115-19)

143. The School Board also offers a variety of other extracurricular activities at senior high schools, including: drama, choral program, string and instrumental music programs, honor clubs, service clubs and various interest clubs. (T2 at 127-28)

144. Defendants do not maintain data on a school by school basis for extracurricular activities but do track overall participation by race. In 1995, black students accounted for 11% of the honor society memberships, 12% of drama clubs, 27% of

student councils, 20% of marching bands, 14% of orchestras, and 19% of choral groups. (PX 1 at 27)

145. These activities are open to all students and no students are denied the opportunity to participate because of their race. [35]

FACILITIES AND RESOURCE ALLOCATION

Site Selection and School Openings and Closings

146. The School Board's duty as to facilities under this Court's order is the same as with transportation and extracurricular activities. As required by prior orders of the Court, the School Board was to make sure that school construction, school consolidation and site selection (including the location of any temporary classrooms) should be "done in a manner which will prevent the recurrence of the dual school structure." (July 1971 Order at 11).

147. The School Board has reported to this Court the opening and closing of schools and the impact of these actions on the race ratios at the schools. (T1 at 24) It has also presented proposed plans to the Biracial Committee for input. (T1 at 64)

148. the percentage of black students attending these

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[35]Mae King, mother of an Armwood High School student, testified that she observed cheerleading try-outs at Armwood recently because she was concerned that there were not enough black cheerleaders. As a result of the try-outs, however, three blacks were chosen for the varsity squad and three were chosen for the junior squad. (T4 at 17-27) Ms. King also recounted an incident where a suggestion was made at a PTA meeting to have a black disc jockey at a school dance and some of the people at the meeting got upset and walked out. (T4 at 20-21; 27-28)

schools the first year was brought closer to the 80/20 ratio. (DX 4)[36] By 1995, five additional schools were built. (PX 2 at 8) None of the new schools has been opened with an allwhite population or a black population of close to 40 percent. (T1 at 26)

149. As a general rule, the School Board has approved construction of new schools in areas of increasing population growth and where the greatest amount of overcrowding exists. (T1 at 25) During the past twenty-five years, most new schools have been opened in the suburbs. In every case of a new school opening, the School Board took into account the projected race ratios at the new schools and assigned satellite attendance areas if necessary to maintain a racial balance at those schools. (T1 at 33) Especially with the elementary schools, the School Board tried to assign students to a school near their residence so they could walk to school. (T1 at 43)

150. A total of nine schools have been closed since the 19711972 school year. (DX 5) When those schools were closed the School Board took into account the race ratios at the closed school and the schools to which the pupils were reassigned. (T1 at 30-31) In most cases, the closing of the schools brought the schools the students were reassigned to closer to the 80/20 ratio. (DX 5)

151. Plaintiffs have been notified of all school construction through the reports filed with the Court as to boundary changes. Plaintiffs have never objected to the location of new schools. Although most of the new schools have been opened in the suburbs, Blake High School, which is a magnet high school opens in the 1979798 school year near downtown

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[36]The School Board's exhibit does not address schools opened after the 1993 school year.

Tampa. Defendants have also opened several magnet schools in predominantly black, inner-city areas: Lee, Phillip Shore, and Dunbar Elementary Schools as well as Young and Middleton Middle Schools. (T1 at 155; 174-177)

Overcrowding

152. During the past ten to twelve years, overcrowding has become a problem for most Hillsborough County schools and double sessions a reality at some. (T1 at 61)

153. Plaintiffs introduced evidence that the schools having a black student enrollment of 40% or more are more likely to be overcrowded in terms of their Florida Inventory of School Houses (FISH) capacity. Plaintiffs' demographics expert, Dr. Shelley, testified that schools with a 40% or more black enrollment are more likely to have enrollments significantly over their FISH capacities than schools which are racially balanced. (T4 at 37; PX 2 at 1113, 22-23)

154. Dr. Shelley's data also shows that in 1995, a total of 102 public schools in Hillsborough County were more than 25% over their FISH capacity: 88 were racially balanced schools and 14 were unbalanced[37] schools. Only 8 of the 88 balanced schools were more than 50% over their FISH capacity but 4 of the 14 unbalanced schools fell into this category. (PX 2 at 23)

155. However, the FISH capacity of a school does not include portable classrooms. Use of portables does not

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[37]Dr. Shelley used the same measure of racial imbalance used by Dr. Armor and Dr. Stevens.

necessarily mean that a school is overcrowded. (T4 at 101-03)[38]

156. Some classes, particularly those which are federally funded, provide an opportunity for a lower/pupil teacher ratio. Thus, a classroom built for 25 or 30 children may hold only 20 children. (T1 at 63-64) Most, if not all, of the sixteen schools with black student enrollments of 40% or more are included in the sixty-one "Title 1" schools in Hillsborough County which received additional funding per pupil for the school year 1996-97. (DX 37)

157. The School Board recognizes that overcrowding is a serious problem and that the entire community is concerned about it. Last year, voters approved a sales tax increase. The School Board appointed an overcrowded Schools Task Force. The Superintendent and his staff compiled data for all Hillsborough County public schools including FISH capacity, number of portables, as well as the acreage of each school site. The Percentage of Capacity Report (DX 32) generated for the Task Force and the School Board is being used to determine what measures need to be taken to relieve overcrowding. (T7 at 222-24)

158. Although no testimony was provided interpreting the Percentage of Capacity Report in terms of individual schools, it appears that of the 105 elementary schools surveyed, the ten elementary schools with the highest number of points include Edison, Witter, DeSoto, Shaw and Cleveland, all of which have black student enrollments of 40% or more. (DX 32, Elementary Schools, at 1)

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[38]Defendants have provided a 46-page list entitled "Relocatable Classroom Inventory" which listing all portable classrooms placed in use between 1949 and 1995 and their locations. (DX 29)

158. Although no testimony was provided interpreting the Percentage of Capacity Report in terms of individual schools, it appears that of the 105 elementary schools surveyed, the ten elementary schools with the highest number of points include Edison, Witter, DeSoto, Shaw and Cleveland, all of which have black student enrollments of 400 or more. (DX 32, Elementary Schools, at 1)

Teacher Resources

159. For the 1992-93 and 1994-95 school year, schools with a black student enrollment of 40% or more had a lower teacher-student ratio than the other schools with fewer than 40% black students. (DX 1, charts 33 and 36)

160. For this two-year period, there was also no discernable difference in terms of educational degrees and experience of the teachers at the over 40% schools and those which were under 40% in terms of black student enrollment. (DX 1, charts 33-36)

Expenditures

161. In 1995, the School Board had a budget of $1.2 billion. (T7 at 150)

162. Funding is received from three separate sources: federal, state, and local. Funds for operating expenses come from the Florida Educational Finance Program (FEFP), a state program that funds school district based on the needs of students and the costs to provide -education in the school district as opposed to other Florida school districts. The FEFP funds come from three sources: state revenue based on sales tax, local property tax revenue, and revenue from the state lottery. (T1 at 185-88)

163. The School Board also receives funding from the federal government for educating handicapped students and funding based on the socioeconomic needs of the students. Capital outlay expenses for new schools and other capital expenses come from local taxes. The School Board also receives some state funds generated from gross receipts on utilities. (T1 at 188)

164. Various agencies of the federal and state government regularly audit the School Board to insure expenses meet the program requirements and that funds are allocated on an equitable basis. (T1 at 190-91; 195-97)

165. There is no difference in the per capita expenditures of the School Board on instructional salaries for teachers districtwide regardless of the racial composition of the schools. (DX 1, charts 37, 40) As stated in the preceding discussion of faculty and staff, instructional salaries are set by the collective bargaining agreement between the teacher's association and the School Board. The federal government also prescribes comparability standards for employees paid by federal funds. (T1 at 199)

166. Funding for instructional resources is allocated by the School Board on a pupil by pupil basis without regard to race, ethnicity, gender, or other limits such as the FISH capacity for the school. When a group of schools is converted to the middle school plan, those schools receive additional resources due to the conversion. (T7 at 191-93)

167. A comparison of expenditures for instructional supplies and equipment for fiscal years 1993 and 1995 showed that elementary and junior high schools which were more than 40% black received slightly less funding than schools which were less than 40% black. (DX 1, charts 38 and 41)

168. The School Board attributes this difference to "conversion funds distributed to schools which were newly constructed or reconfigured pursuant to the Middle School plan" and notes that "[m]ost of the over 40% schools [are] not scheduled for conversion until the 1996-1997 and 1997-1998 school years." (Dkt. 797 at 83) The record supports this argument. (T1 at 97)

169. In addition, a study of total capital expenditures for fiscal years 1993 and 1995 indicates that there was essentially no difference between schools which were over or under 40% black. During the latter year, elementary schools which were over 40% black received more funding. (DX 1, charts 39 and 42)

170. A review of capital expenditures during the period 1991 to 1995 by Dr. Armor revealed that expenditures for inner city elementary schools (which comprise most if not all of the more than 40% black schools) were slightly higher than those of the other elementary schools.[39] Spending for the inner city junior high schools was substantially higher than other junior high schools. (DX 1, chart 43)

QUALITY OF EDUCATION

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[39]Darrell Daniels, one of the witnesses called by plaintiffs, is employed with the Urban League and operates youth development programs at Robles and 31 other schools. One of his children attends Robles. While commending the principal of Robles, Mr. Daniels, who is African American, criticized the lack of commitment to education which he saw in the other personnel at the school. He also felt that Robles did not have the equipment such as computers which other schools have. However, he agreed that a school's commitment to education can vary regardless of the racial make-up of the school. (T6 at 58-77)

171. Several witnesses called by plaintiffs, including plaintiff Andrew Manning and School Board Chair Doris Reddick, testified poignantly about the differences between black and white schools in the era of de jure segregation. Mr. Manning and Ms. Reddick attended public schools in Hillsborough County. Ms. Joanna Tokley taught in the public schools, both before and after the Court's 1971 desegregation order. All three are African American. (T3 at 163-68; T5 at 20-23; T6 at 103-110)

172. Orders entered in this case have not required the School Board, in dismantling the dual school system, to attain specified levels of student achievement or any other standard to evaluate quality of education. However, this Court's referral order directed that the quality of education, along with the other Green factors be evaluated as well as the School Board's good-faith commitment in determining whether the public schools of Hillsborough County have attained unitary status.

173. Evidence presented by the parties concerning the quality of education today focused on academic achievement, enrollment in gifted programs, and suspension and dropout rates. Other factors bearing on quality of education such as facilities and resources as well as magnet programs have been addressed in the preceding sections.

Achievement Tests

174. Since 1977 the School Board has examined the results of achievement tests by students of different races on a regular basis. (T2 at 147)

175. Dr. John Hilderbrand, who has supervised testing for the Hillsborough County school system since about 1977, testified that there are an increasing number of state-mandated

tests for students that are administered and evaluated by the School Board. (T2 at 138-40)

176. On the Stanford Achievement Test, Hillsborough County students scored slightly below the 50th percentile in reading and slightly above the 50th percentile in math and language which is the average rank for a national population. (T2 at 139-140) A standardized writing exam given to students in the fourth, eighth and tenth grades demonstrates that Hillsborough County students score higher than any of the other large school districts in the state. (T 2 at 140) Similar results are obtained on the High School Competency Test (HSCT). (T2 at 141) Scores for black students on the writing exam and HSCT show that Hillsborough County students outperform state averages for those tests. (T2 at 141)

177. A voluntary test taken by about 47% of seniors in high school--the Scholastic Assessment Test--has consistently produced results that place Hillsborough County students above national and state averages. When the scores are analyzed by race, the same result is shown. Black students in Hillsborough County outperform state and national norms. (T2 at 141)

178. In attempting to evaluate how,well the school system is educating all of its students, Dr. Armor examined standardized tests (the Stanford Achievement Test) given to fifth grade students in Hillsborough County in the spring of 1994 and the spring of 1995. Overall, black students scored 16 to 17 points lower than white students in reading and math. (T3 at 88-89; DX 1, chart 44) This represents approximately three-fourths of a standard deviation. (DX 1 at 21)

179. A nationwide study conducted in 1992 found that similar differences exist between blacks and whites at all grade levels in math and reading; the achievement gap ranges from

two-thirds to four-fifths of a standard deviation depending on the grade and test level. (DX 1 at 21)

180. However, when performing a regression analysis which used socioeconomic factors relating to family income, single or two parent families, and the educational background of the parents, the gap in scores between black and white students narrows considerably. (T3 at 90-101; DX 1, chart 45) Dr. Armor concluded that about 600 of the gap in the reading scores for black and white students and about 66% of the math scores can be explained by socioeconomic factors. (DX 1, chart 46)

181. Additionally, when the first grade test scores for the same group of students are added as an additional variable, almost 75% of the reading gap and 90% of the math gap is explained by these variables.[40] (DX 1 at 22-23, chart 47)

182. An analysis of Stanford Achievement Tests taken by eighth grade students revealed similar results. About 71-72% of the gap in reading scores and about 84-860 of the gap in math scores between black and white students in Hillsborough County for the same years was attributable to a combination of socioeconomic factors and first grade test scores. (DX 1 at 23, charts 48 and 49; T4 at 98-100)

183. Dr. Robert Crain, a witness called by plaintiffs, criticized some of the assumptions and methodology employed by Dr. Armor in arriving at his conclusions. (T6 at 157-207)

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[40]First grade test scores are used as a predictor of student achievement or skills before entering school. (T3 at 96) However, the tests are given in the spring of the school year rather than the fall and therefore are the product of the first grade curriculum to an extent. (T6 at 253; 283; T7 at 186-87)

184. Dr. Crain disagreed with Dr. Armor's use of first grade test scores as predictors of student achievement entering first grade because the tests are given in the spring rather than in the fall. (T6 at 162-63) He did agree that a student's entry-level skills are important predictors of how well a student will perform on the fourth and eighth grade tests. (T6 at 253-53)

185. Dr. Crain also disagreed with Dr. Armor's use of neighborhood data to determine the variables of family income and educational level of parents because that data reflected averages rather than actual figures for a neighborhood and therefore would presumably include both black and-white families. (T6 at 168-73; 236) However, Dr. Crain uses neighborhood income in the studies he conducts. (T6 at 236) Dr. Crain also questioned whether family income and educational background could be remnants of the prior segregated school system. (T6 at 174-76)

186. Overall, Dr. Crain thought that Dr. Armor had overestimated the effects of socioeconomic factors on achievement test scores. (T6 at 192) Although he disagreed with some variables used by Dr. Armor, Dr. Crain did agree that the socioeconomic factors of free lunch and the number of parents at home were relevant and important variables. (T6 at 266) Using these factors, he obtained a line of regression similar to Dr. Armor's study. Dr. Crain did not determine the statistical significance of the differences between his study and Dr. Armor's (T6 at 270)[41]

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[41] Dr. Crain disagreed with Dr. Armor's use of a "two-tailed" statistical model and felt that he should have used a "single-tailed" analysis. (T6 at 274) His preference for the single-tailed analysis was that "no one ...would expect blacks to score better in higher black schools." (T6 at 274) The reasons cited by Dr. Armor for use of the two-tailed analysis are morepersuasive and refute Dr. Crain's

187. Dr. Crain's study showed that fifth-grade black students attending the schools with over 40 percent black enrollment performed less well in than their counterparts at the schools with under 40 percent black enrollment. (T6 at 206-07) However, these differences occurred only with reading. There were no differences in math. (T6 at 281-82)

188. However, when Dr. Crain used the same variables as Dr. Armor he reached substantially the same results. (T6 at 265-66)

Academic Outcome

189. To evaluate how well the school system is doing in educating high school students, Dr. Armor examined grade averages and college plans as no standardized tests are taken by twelfth graders. White students have a 2.9 grade average; black students have a 2.3 grade average. Fifty-six percent of the high school seniors who were white planned to attend college as compared to forty-five percent of black students. (DX 1 at 24-25, chart 54)

190. When adjustment is made for socioeconomic factors and tenth grade achievement tests, Dr. Armor concluded that the grade average gap for black and white seniors would be only about .15 grade point. (DX 1 at 25, chart 55) After adjusting for socioeconomic factors, the difference between black seniors and white seniors in terms of college plans is practically negligible. (DX 1 at 25, chart 55)

Gifted Programs

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assumption that black students in schools with a higher black enrollment will always score lower than those students in schools with a lower black enrollment. (T7 at 161-69)

191. As of October 1996, approximately 75% of the students enrolled in Hillsborough County gifted programs were white and approximately 9% were black. The remaining 16% were from other minority groups: 11% Hispanic, 4% Asian, and Indian and multi cultural, less than 1% each. (T2 at 151-52) While the number of black students in the gifted program is disproportionate to the number of black students enrolled in public schools, students must both apply to the gifted program and meet minimum criteria including attainment of a minimum score on a standardized test.

192. Until 1991, admission into gifted programs was set by state standards requiring an IQ test of 130 or higher. That year, the state adopted a plan to increase the number of minority gifted students and invited school districts to submit alternate criteria for admission. Hillsborough County elected to participate and submitted criteria under this program (referred to as "Plan B") which included an IQ score of 115 or higher together with demonstrated academic achievement and other characteristics typical principals are expected to follow-up with each student on an individual basis to give specific suggestions on how to stay in school or participate in alternate programs such as the GED program or adult education which meets the needs of the student. (T7 at 207)

198. The dropout rates for Hillsborough County public schools are the lowest in the state for similar large urban school districts. In the past five years dropout rates have averaged about 3½%. (T7 at 208-09)

199. Dr. Armor examined data for the high school graduating class of 1995 beginning when those graduates were in the eighth grade. The difference in dropout rates for blacks (15%) and whites (9%) is not significant. When adjusted for socioeconomic factors, that difference is negligible. (DX 1 at 24, charts 52, 53)

Suspension Policies and Rates

200. The School Board also tracks suspensions and expulsions by .sex, race, and age. The suspension rates for Hillsborough county are lower than state-wide averages in some areas and for some groups. (T7 at 234) The School District has out-of-school suspension programs as well as seven alternative school sites. Individual schools can elect to run an in-school suspension program; that decision is left up to the administration at each school. (T7 at 234-36)

201. Dr. Armor did not examine suspension rates but Dr. Stevens did. After examining four years of data (1990-1994), Dr. Stevens concluded that black students are suspended from school at disproportionately high rates. He found that in 1994-95 the suspension rate for black students was two to four times higher than the rate for white students depending upon grade level and the type of suspension. This data did not lead Dr. Stevens to infer racial discrimination, however. His criticism was that the School Board had not examined this data more closely on a school-by-school basis "to verify that disparities are not race-related." (PX 1 at 29-30)

GOOD-FAITH COMPLIANCE WITH COURT ORDERS

202. The parties disagree as to defendants' history of good faith compliance with court orders and what factors are relevant to this determination.

203. Defendants point out that for more than 25 years, defendants have complied with this Court's Orders to desegregate the public schools of Hillsborough County and to eradicate the previous illegal dual school system previously maintained. The record establishes that not. once during that

period of time have defendants been found in violation of any Court orders.[42]

204. During this period of time, the parties have regularly conferred, through their respective attorneys and desegregation experts, to ensure that the school system was moving forwards, not backwards, toward compliance with the Court's orders. (Prior R and R at 29 and n. 21)

205. At some point in the mid-1970's there were apparently several ex carte discussions between School Board staff and the District Judge formerly assigned to this case concerning whether the School Board needed to adjust boundaries at certain schools when racial enrollments changed. Plaintiffs learned of these conversations during a 1995 hearing on plaintiffs' motion to enforce court order when the School Board sought to admit testimony from John Heuer, former Assistant Superintendent, concerning these conversations. The undersigned ruled this testimony inadmissible on the basis of plaintiffs' objections .[43]

206. However, during the unitary status hearing, plaintiffs sought to introduce this testimony on the issue of defendants' good-faith compliance. Dr. Heuer testified that on a couple of occasions between 1972 and 1974 he received guidance from the Court, or the Court's law clerk, concerning

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[42]There is, of course, the plaintiffs' motion to enforce court order filed in 1994 which remains pending before the Court following entry of the June 1995 Report and Recommendation recommending that the motion be denied. However, the Court noted in its subsequent referral order that the motion and recommendation "would be rendered moot upon a finding of unitary status." (Dkt. 709 at 3)

[43]See Prior R and R at 22 n

what to do about schools where the boundaries had not changed but the racial composition of the school had changed. He was told that "if [the school board] had not created the problem, [the school board] did not have to go back necessarily and correct it." (T7 at 17) Notwithstanding this advice, defendants did their best to try to improve the race ratios when possible, taking into consideration the distance factor for transportation and the burden it placed on the students. (T7 at 18-22)

207. Although the testimony on this point is not entirely clear, it appears that these discussions consisted of (1) one or two face-to-face meetings with the Court, Mr. Heuer, possibly Raymond Shelton, then Superintendent,[44] and Crosby Few, counsel for defendants, and (2) a couple of telephone conversations between Mr. Heuer and the Court's law clerk. These discussions were initiated by the Court or the law clerk, not defendants. (T7 at 11-16, 50)

208. Both the former and the current Superintendent of Schools testified at the unitary status hearing. Dr. Walter Sickles served as Superintendent from 1989 to July 1996 when he was replaced by Dr. Earl Lennard. Dr. Sickles had been employed by the School Board in various capacities beginning in 1969. Although he believed that the school system had become unitary in the early 1990's he did not suggest moving in that direction at that time because he felt that the obtaining court approval for the middle school plan should have priority. Dr. Sickles also believed that a move to end court supervision at that time would be opposed by plaintiffs and instead aimed at working with plaintiffs towards adoption of the middle school plan in the 1991 Consent Order. (T7 at 99-124)

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[44]Mr. Shelton is now deceased.

209. Dr. Lennard, appointed Superintendent in July 1996, has been employed by the School Board since approximately 1964. He previously served as Deputy Superintendent and Assistant Superintendent for Administration. He testified that he strongly feels a "moral and legal obligation on the school system to continue a desegregated school system." (T7 at 238-39) However, he has not developed any specific plans regarding what transportation policies he would recommend if unitary status were found other than continuing the activity buses. (T7 at 239-40)

210. Doris Reddick, the only black School Board member, was elected Chair by her colleagues. All seven of the School Board members run from districts but are elected county-wide. Ms. Reddick testified that the School Board had never taken a formal vote or held public hearings on whether to seek unitary status. When the Court's Referral Order was entered, School Board members discussed the issue with counsel in terms of the unitary status issues. Ms. Reddick testified that she did not think that the School Board should be released from supervision now or at "any other time that I see in the future." She explained that "I am not sure we have actually crossed over the wall, and I mean the wall of equal distribution of everything that the unitary system calls for." (T5 at 27-30) However, when asked whether the School Board had developed any contingency plan to operate if unitary status is granted, Ms. Reddick indicated that any plan would maintain a system in which "all children will receive equal education." (T5 at 26)

211. The other School Board members who testified at the hearing, Carolyn Bricklemyer, Candy Olson, Yvonne McKitrick, Glenn Barrington, and Carol Kurdell, expressed no misgivings about whether Hillsborough County schools are unitary or the intent and ability of the School Board to continue

a desegregated school system while receiving input from all members of the community. (T5 at 10-12, 16, 32, 39-40)

212. Mr. Manning, the lead plaintiff in the case, agreed with Ms. Reddick that the School Board had not yet completely eliminated the vestiges of segregation. He was concerned about the schools with increased black enrollments[45] as well as the fact that black students were bused more often than white students. Mr. Manning did not think that there should not be any schools in the county with black student enrollments of 80% or more. He stated that there was a feeling of distrust and unhappiness with the School Board in the black community, and referred to reading two years ago about "secret meetings that were held between the School Board and the judges," an apparent reference to Mr. Heuer's testimony discussed above. However, Mr. Manning stated that he was consulted about the middle school plan proposed to the court and that he agreed with it as it was fully endorsed by counsel, the Legal Defense Fund. (T6 at 113-33)

213. Joanna Tokley, a 22-year member of the Urban League who is currently President and CEO, testified on behalf of plaintiffs that she did not feel that the School Board was ready to be released from court supervision. (T3 at 187-89) She expressed concern that the inner-city schools might be passed over in terms of renovation projects and that low enrollments might cause the loss of instructional or library staff. Ms. Tokley thought that there were still some employees who were insensitive and made improper comments to children who qualified for free lunches. She recounted a incident involving

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[45]Mr. Manning agreed that some parents of black students do not want their children transported out of schools which are majority black but he felt that those parents were concerned more with convenience rather than the quality of education. (T6 at 126)

her godson who played basketball against East Bay High School in 1995.[46] (T3 at 180-89)

214. Ms. Tokley served on the Biracial Advisory Committee for ten years beginning in 1974 but resigned because she disagreed with its limited role. She felt that sometimes boundary changes were "rubber stamped" by the Committee and the School Board despite the fact that she and a minority of the Committee members voiced disagreement with those recommendations at the School Board hearings. (T3 at 182-84)

215. Ms. Tokley continues to be involved with the school system, however. She served on the Education Committee of the Chamber of Commerce and the Goals 2000 committee. She presently serves on the School Board's Overcrowded Schools Task Force. Additionally, she directs Urban League programs in about 32 Hillsborough County schools which provide self-esteem and behavioral modification programs for students of all races as well as tutoring and other programs. (T3 at 170-77)

CONCLUSIONS OF LAW

Plaintiffs submit that the Court must resolve four legal issues: (1) outstanding legal issues regarding defendants' prior compliance with existing orders; (2) whether a finding of unitary status is appropriate, absent modification of the 1991 Consent order; (3) whether defendants have demonstrated that no remaining vestiges of the prior de jure segregated school system exist; and (4) whether defendants have demonstrated

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[46]Ms. Tokley also testified about other incidents involving family members in the mid to late 1970's which she felt indicated disparate treatment. (T3 at 178-81)

good-faith compliance with both the 1971 Orders and the 1991 Consent Order.

Defendants submit that all these issues are subsumed within the unitary status inquiry. However, these issues will be evaluated as suggested by plaintiffs.

Plaintiffs' 1994 Motion To Enforce Court Order Should Be Denied As No Violations Have Been Shown

Plaintiffs have only once alleged that defendants violated this Court's orders, in 1994. Those allegations were fully addressed in the Prior Report and Recommendation dated June 23, 1995 and the proposed findings and conclusions made therein are incorporated here by reference.

This is a threshold issue which remains pending before the Court and should be resolved prior to a determination of unitary status. Cf. Bradley v. Pinellas County, 961 F.2d 1554, 1558 n.9 (11th Cir. 1992).[47] Therefore it is recommended that the Court conclude that defendants have not violated either of the 1971 Orders or the 1991 Consent Order as alleged by plaintiffs in their prior motion to enforce court order. No subsequent developments, either factual or legal, justify reconsideration of those recommended findings and conclusions

A Finding of Unitary Status Is Not Barred By the 1991 Consent Order

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[47]Of course, the burden is on plaintiffs in their motion to enforce to demonstrate that defendants have violated the Court's orders. In a unitary status determination, the School Board has the burden of establishing it has eliminated the vestiges of the prior de jure segregated school system and has complied in good faith with the Court's orders.

Plaintiffs contend that it is premature for the Court to makt a determination of unitary status because the terms of the 1991 Consent Order have not been fully met.

The 1991 Consent order approved and incorporated the Report of the Middle School Task Force. (Consent Order at 2-5) The Task Force Report addressed a restructuring of Hillsborough County schools to establish middle schools serving grades 6-8 to be implemented over a seven-year period.

In agreeing to the terms of the Consent Order, counsel for the parties "represented to the Court that in their opinion, the modifications set forth in this Agreed Order meet applicable constitutional standards and will continue the progress of the Hillsborough County public schools toward a unitary system from which all vestiges of past discrimination have been eliminated." (Consent Order at 2)

A district court unquestionably has the inherent power to grant a modification of a consent order in a desegregation case. Modification may be considered when (1) a significant change in facts or law warrants change and the proposed modification is suitably tailored to the change; (2) significant time has passed and the objectives of the original agreement have not been met; (3)continuance is not longer warranted; and/or (4) continuance would be inequitable and each side has legitimate interests to be considered. See Jacksonville Branch NAACP v. Duval County Sch. 978 F.2d 1574, 1578 (11th Cir. 1992) (citations omitted).

Attainment of unitary status is a material change in circumstance which could justify termination of court supervision over the School Board.

There are No Remaining Vestiges of the De Jure Segregated System

In a school desegregation case, "the court's end purpose must be to remedy the violation and in addition to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution." Freeman v. Pitts, 503 U.S. 467, 489 (1992) (citation omitted). A school system has fulfilled its constitutional duty when it has complied in good faith with the court's desegregation decree since it was entered and has "eliminated the vestiges of past discrimination to the extent practicable." Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 248 (1991) (citation omitted).

A dual school system is one which has engaged in intentional segregation of students by race; a unitary system is one which has been brought into compliance with the Constitution. See id. at 246 Thus, the court must examine all facets of a school district that was once a dual system, both when ordering a remedy and when the later question is whether the district courts' remedial control should be modified, lessened, or withdrawn. See Freeman, 503 U.S. at 486.

In 1968, the Supreme Court identified those factors relevant to the unitary status inquiry as: student assignment, faculty and staff, transportation, extracurricular activities, and facilities. See Green v. County Sch. Bd. of New Kent County, 391 U.S. 430, 435 (1968). These Green factors must be considered in light of the school district's specific obligations under the Court's orders, in this case the 1971 Order and the 1991 Consent Decree. ,Sgg Missouri v. Jenkins, 515 U.S. 70, 100 (1995).

In addition, the school district must demonstrate its "goodfaith commitment to the entirety of a desegregation plan so that parents, students and the public have assurance against

further injuries or stigma." Freeman, 503 U.S. at 498. Further, the district court, in its discretion, may consider other facets of the school operations, such as the quality of education. Lockett v. Bd. of Educ. Of Muscogee County School, 111 F.3d 839, 843 n.l (11th Cir. 1997).

This Court has directed defendants in this case to address all of the Green factors, including the "quality of education being received by all students," as well as the "good faith commitment by the School Board." (Order of Referral at 4)

STUDENT ASSIGNMENTS

Where a school board has a history of practicing segregation, a district court must presume that substantially disproportionate racial compositions within the schools are constitutionally violative. To overcome this presumption, a school board must prove that the imbalances are not the result of present or past discrimination. See Lockett, 111 F.3d at 843 (citing Swann v. Charlotte-Mecklenburg Bd. Of Educ., 402 U.S. 1 (1974)).

However, the "constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." Swann, 402 U.S. at 24. Nor is a school board required to make adjustments in student attendance zones for racial imbalances caused by demographic factors. See Freeman, 503 U.S. at 494. "The' Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race." Missouri v. Jenkins, 515 U.S. 70, 121 (1995) (Thomas, J., concurring).

Although the Swann Court did not further define what measure a court is to use in determining whether the racial composition of a school is "substantially disproportionate," the expert witnesses for both sides in this case have used the standard of a plus or minus twenty percent (200) deviation from the county-wide percentage of black and white school age children.

According to 1990 census data, twenty-three percent (23%) of Hillsborough residents between the ages of zero and seventeen are black; seventy-seven percent (77%) are white. As stated previously, the 1990 Census is the most recent data available. Both sides' experts have used schools with 40% or higher black student enrollment as the focus of any inquiry into substantially disproportionate race ratios although, in actuality, a 43% or higher figure would be more appropriate given the most recent census data.

There is no dispute that most Hillsborough County studentsattend public schools in which the percentage of black and white students is generally proportionate to the percentage of white and black school age residents of Hillsborough County. It is also evident that most of the county's schools have been racially balanced since 1971 when the Court ordered the School Board to dismantle the dual school system. The year following the 1971 Order, all of the public schools of Hillsborough County had been desegregated.

However, approximately ten percent of the 159 public schools, mostly elementary schools, reflect student enrollments in which the percentage of black students is substantially higher than the percentage of black children under age seventeen shown by the 1990 census data. All of these schools were racially balanced immediately following implementation of the Court's 1971 Order. A few of the schools crossed the 40% line in the five to ten years following the Court's 1971 Order. Most

of the schools were balanced until about ten years ago and have become out of balance since then.[48]

This Court, in its referral order, declined to adopt a specific percentage figure of what constitutes a racially identifiable school and concluded that "the better procedure is toconsider that this determination is entirely dependent upon local conditions." (Order of Referral at 5) , If, by this, the Court meant the racial make-up of the neighborhoods surrounding the schools, then the Court may find that none of the sixteen schools in question are racially imbalanced, at least when comparing the race ratios for the 1990-91 school year and census figures for 1990 for the tracts surrounding those schools, as noted previously.[49]

The evidence strongly points to residential housing patterns as the explanation for the change in racial composition of these schools. This explanation is especially persuasive when the racial enrollments of the schools are compared to the changing racial make-up of the neighborhoods in which these schools are located. The expert testimony and evidence supports the conclusion that the schools with the largest black student populations are located within attendance areas that have had the greatest increases in the number of black school-age residents.

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[48]Also, most of the schools that plaintiffs point to as evidence of the prior dual school system had black student enrollments that were over 40% or approaching 40% when plaintiffs and defendants sought court approval to implement the middle school concept by modifying the desegregation plan outlined in the 1991 Consent Order. (Prior R and R, at 27, 32-35, 40)

[49]See supra paragraph 68.

The School Board has never, since the 1971 Order, drawn school boundaries or assigned students to separate schools on the basis of race. For those schools with current racial imbalances, changes in attendance areas have generally resulted in improving the racial balance, at least for the year immediately following the boundary change.[50] Those few instances in which the boundary changes have not improved the racial balance cannot be viewed as any effort by the School Board to return to the prior dual school system.

The School Board's evidence on this issue was essentially unrebutted by plaintiffs. Dr. Shelley, the demographic expert called by plaintiffs, did not perform any independent demographic studies but relied on the data assembled by Dr. Clark, the School Board's demographic expert. Dr. Shelley's testimony does not undermine the finding that demographic changes in the surrounding areas are the most likely cause for the racial imbalances present at about ten percent of the schools.

It is true that plaintiffs are not required to show that School Board action caused the racial imbalances at some of the schools. The burden was and is on the School Board to establish that the imbalances are not proximately traceable to past or current discriminatory School Board policies or actions. However, the School Board has met its burden with the testimony of Dr. Clark and Dr. Armor which is supported by reasonable assumptions and census data.

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[50]Notwithstanding defendants' withdrawal of Dr. Clark's testimony addressing the effect of boundary changes (T2 at 57-64; 74-80), Dr. Miliziano's testimony, as well as Dr. Armor's supports this conclusion. (T1 at 43-61; 100-103; T3 at 33-49;53)(DX 3) Dr. Shelley, plaintiffs' expert, found that about onehalf of the boundary changes improved the racial balances the following year. (DX 2 at 9)

The School Board has met its burden of establishing that the current racial imbalance in these schools is not proximately caused by any unlawful School Board action, past or current, that assigns students to separate schools on the basis of race. See Freeman, 503 U.S. at 494.

The location of certain schools with below 40% black enrollment in the same cluster as the elementary schools with black enrollment of 40% or more is not evidence of any discriminatory motive or practice on the part of the School Board. Although plaintiffs have pointed in conclusory terms to the **possibility** of intra-cluster assignments to alleviate the racial imbalances of some of these schools, in most cases the attendance zones for the other schools are not immediately adjacent. Where they are adjacent, there is a natural barrier such as a road or railroad track. Most of the sixteen schools in question are surrounded by schools with black enrollments of close to or over 40% of the total student population. Moreover, although plaintiffs have alleged that the school system is not unitary as to student assignment, they have not proposed specific solutions to remedy what is alleged to be an on-going constitutional violation.

A school board's affirmative duty to desegregate does not require adoption of the most desegregative alternative available. Practicalities such as transportation (and funding) may properly be considered by a court in determining the scope of desegregation plans even though more ambitious. plans might achieve greater desegregation. See generally Lee v. Anniston City Sch. Sys., 737 F.2d 952, 957 (11th Cir. 1984).

Further,

> [w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the

> practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated. Residential housing choices, and their attendant effects on the racial composition of schools, present an everchanging pattern, one difficult to address through judicial remedies.

Freeman, 503 U.S. at 495.

The Court must also consider the parties' prior representations in this case. One of the stated goals of the Middle School Plan approved by both plaintiffs and the School Board and adopted by this Court in 1991 was **to retain a desegregated school system** (emphasis added). Plaintiffs have stipulated to this fact. (Prior R and R at 2, nn.3 & 6) A major objective of the cluster plan was to have neighborhood schools while maintaining a desegregated school system. (Prior R and R at 30) (citing Task Force Report) (T7 at 116)

In determining proposed attendance zones for the clusters, the School Board projected that the plan would improve the racial balance for some schools but cause racial imbalances to increase at others. Overall, however, the proposed attendance areas would increase the number of schools within the school system with student populations that were racially balanced. This plan was adopted by the School Board only after a series of public hearings, meetings with community leaders and organizations, and the full participation and approval of plaintiffs' counsel and their desegregation expert, Dr. Stevens. (Prior R and R at 6-7, 29-33)

Neither the 1971 Order nor the 1991 Consent Order required the School Board to periodically adjust the racial enrollment at particular schools on an annual or less frequent basis once the initial goal of desegregation of student attendance patterns was achieved. (Prior R and R at 15, 29-38)

Thus, although the School Board has not been obligated to maintain a particular racial balance at each school, it has utilized the ratios outlined in the 1971 Order as the "most acceptable and desirable form of desegregation" as a guide in formulating student attendance zones and in evaluating the impact of other School Board decisions on its mandate from this court.

The School Board has also adopted a magnet school program, a favored desegregative technique, and has devoted substantial resources to implementing and publicizing this program to students, their parents, and the community. It is true that some aspects of the magnet program remain to be implemented as this coming school year is the final year of implementation for the plan approved by the Court in the 1991 Consent Order. However, the magnet programs and schools are located in the inner city areas and are expressly designed to be racially balanced. The percentage of black students who may participate in magnet programs is 23% but this percentage may increase to 40% if an insufficient number of other minority students apply for the programs. Plaintiffs' contention that defendants are continuing to discriminate because of the policy that caps black enrollment at 23% ignores the federal requirement that magnet schools reflect the ethnic backgrounds of all minority groups within the county.

The Court in its 1971 order continued the requirement imposed in prior orders as to Majority to Minority (M to M) transfers permitting any student whose race constitutes the majority of students at a school to voluntarily transfer to the

school closest to his home in which his race is a minority of the students, with transportation provided if necessary. According to the School Board, no student has ever applied for a transfer under the M to M policy. Plaintiffs do not refute this evidence but contend that the School Board has not understood its obligations under this policy. To the extent that the School Board has not in the past publicized this policy, that was rectified more than a year ago.[51] If transfers are sought for other reasons, the School Board staff now takes the affirmative step of reviewing the application to see if the student would be eligible for an M to M transfer.

Although the absence of M to M transfer applications is troubling, the Court's 1971 Order did not require the defendants to solicit M to M transfers; they were only required to grant them if requested. There has been no violation of the Court's Order as to the M to M transfer policy. Also, Dr. Stevens testified that M to M transfers would not be statistically significant in reducing the racial imbalances at the sixteen schools in question.

On the whole, the School Board has demonstrated that its schools are unitary as to student assignment policies and practices and that the increased black enrollments at about 10% of the schools which are substantially disproportionate to the districtwide racial ratios are due to increased number of black school-age children residing in those neighborhoods. See, e.g., Freeman, 503 U.S. at 494 (court's 1969 desegregation decree was designed to achieve maximum practicable desegregation and achieved its goal in the first year of operation "before

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[51]There is nothing in the record to indicate whether the School Board would continue the M to M transfer program if court supervision were lifted. The School Board may wish to address this issue in a supplemental filing with the Court.

dramatic demographic changes altered residential patterns"; "[f]or the entire 17 year-period the respondents raised no substantial objection to the basic student assignment system, as the parties and District Court concentrated on other mechanisms to eliminate the de jure taint"); Morgan v. Nucci, 831 F.2d 313, 320-21 (1st Cir. 1987) (finding of unitary status upheld despite existence of 13 schools in Boston school district with enrollments of one race comprising 80% or more of total enrollment at school); Stell v Bd. of Pub. Educ. for the City of Savannah, 860 F. Supp. 1563, 1583 (school district unitary despite the fact that 11 of 44 schools were 20 percentage points or more outside district-wide race ratios).

FACULTY AND STAFF ASSIGNMENT

The testimony presented by the School Board indicates that the faculty and staff at Hillsborough County public schools have been and remain desegregated.[52]

Plaintiffs have not disputed defendants' statistics or the evidence of vigorous recruitment of minorities but contend that certain schools exceed the system-wide race ratios by a significant percentage. The conclusions of Dr. Stevens and Dr. Armor differ as to whether the any schools deviate more than 15% from the district wide faculty average. Dr. Stevens identified twelve elementary schools that fit this category; Dr. Armor identified none. This difference is largely due to the fact that Dr. Stevens included non-certified staff within his calculations and Dr. Armor included only faculty. However, the School Board's 14% black faculty figure did not include staff. For this reason, Dr. Armor's conclusion is more reliable. Given

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[52]In July 1971 the Court noted that faculty desegregation had been accomplished "at every school location in the 1970 school year." (July 1971 order at 8)

the absence of any schools which have a 15% deviation from the district-wide average, racial identifiability in faculty and staff assignments has not been demonstrated. See, eTa., S e , 860 F. Supp. at 1576; see also Flax v. Potts, 915 F.2d 155, 163 (5th Cir. 1990) (unitary status achieved by school board despite six schools with faculty and staff 20 percentage points or more from system-wide ratio).

Admittedly, the School Board has not achieved the goals it has pursued of having the same ratio of black and white teachers as the student body. Black student enrollment in the district is about 23%. - However, there is no dispute that recruitment of minority teachers has been and remains an important goal for the School Board.

Additionally, the percentage of principals and assistant principals who are black exceeds the percentage of black teachers and the school Board has an active mentoring program designed to provide support for instructional staff seeking advancement. About one of every six principals is black; more than one out of every five assistant principals is black.

The School Board has established by a preponderance of evidence that it has eliminated racial discrimination in hiring and assigning of faculty and staff. The public schools of Hillsborough County are unitary as to this Green factor.

TRANSPORTATION AND EXTRACURRICULAR ACTIVITIES

All public school students are entitled to transportation to and from school if they live two miles or more from their school. Race has no bearing on a student's right to transportation.

Although it is under no legal obligation to do so, the School Board also provides "activity buses" for students needing later transportation who participate in after-school activities.

There is no evidence of discrimination in providing transportation to students, including activities buses. Defendants have complied with this Court's orders regarding transportation of students.

It is true, as plaintiffs contend, that proportionately more black students are bused for desegregation than white students. By its very nature, the desegregation plan adopted by the court imposed a greater transportation burden on black students. While recognizing this fact, the Court found that its plan would result in busing fewer students, among other factors. (July 1971 Order at 74) of discrimination due to race. Extracurricular activities are provided primarily at the high school level. The School Board places no racial restrictions on a student's ability to participate in extracurricular activities. The testimony of Ms. King demonstrates her concern as the mother of a black high school student about cheerleader selection at one high school. However, the try-outs she attended resulted in several black students being invited to join the cheerleading squad.

Plaintiffs' desegregation expert, Dr. Stevens, did not point to any instances of discrimination in the extracurricular programs offered by defendants. Instead, Dr. Stevens suggested that sufficient .data was not maintained to enable defendants to ensure that this aspect of the school system was free from discrimination, such as records from individual schools instead of district-wide data about extracurricular participation.[53]

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[53]Apparently, the School Board tracks participation in athletic activities at individual schools by race but does not do this

However, there is nothing in the Court's orders which required information of this sort to be maintained and speculation about what such records might reveal is insufficient ground to preclude a finding of unitary status.

The testimony shows that defendants have eliminated discrimination based on race in the areas of transportation and extracurricular activities and the court should so conclude. The Hillsborough County school system is unitary as to these two Green factors.

FACILITIES AND RESOURCE ALLOCATION

Although most new schools have been built in the suburbs, this is consistent with the county's growth patterns. When assigning students to a new school, the School Board has taken into account the projected race ratios. No new schools have been built with projected black enrollment of greater than 40%. Furthermore, when closing or converting schools, the School Board has taken into account the impact on race ratios and tried to improve the racial balance when reassigning students to other schools.

The School Board has also established that its allocation of funds and teacher resources is free from racial discrimination. Much of the budget comes from state and federal sources and the School Board is regularly audited to determine that it is in compliance with standards for use of those funds. Individual schools are funded on a per-pupil basis and the race of the student has no bearing on how funds are spent. Schools that are brought into the middle school cluster plan receive additional funds for that year. In recent years, total per capita expenditures have actually been higher at schools

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with other extracurricular activities.

with a 40% or higher black enrollment. These are among the schools that receive additional funds from the federal government (known as Title I funds) due to the number of students who come from families who meet poverty level guidelines.

To the extent that overcrowding is included in the calculus of resource allocation, it is evident that overcrowding is an unfortunate reality at most schools in Hillsborough County. The total population of Hillsborough County increased by almost twothirds between 1970 and 1990. The number of public schools grew from 129 in 1971 to 159 in 1995. The degree of overcrowding varies at individual schools across the county. Plaintiffs introduced evidence that proportionately more of the schools that are racially imbalanced are above their FISH capacity when compared to the racially balanced schools. The evidence submitted by defendants shows how capacity is extended with portables but the School Board's evidence also suggests that five of the ten most overcrowded elementary schools are among the schools with a higher percentage of black students enrolled. This evidence is disturbing, but it does not demonstrate discriminatory conduct or policy on the part of the School Board. Evidence presented by defendants also indicated that the teacher-student ratios are lower at the schools having black student enrollments of 40% or more.

Defendants have demonstrated that the Hillsborough County school system is unitary as to the Green factors of facilities and resource allocation.

QUALITY OF EDUCATION

Quality of education, while "admittedly an amorphous concept", is a fundamental concern in any desegregation case. Freeman v. Mills, 942 F. Supp. 1449, 1461 (N.D. Ga. 1996), aff'd, 118 F.3d 727 (11th Cir. 1997). "If there is one common

thread in [Brown] and its progeny, it is the assumption by the federal judiciary of a role in which it can, by exercise of its equitable jurisdiction, compel a school districts which were once segregated by law to offer each of their children, irrespective of race, a quality of education which is substantially similar to that offered to all other children." Id. At the same time, "[e]nshrined in the Constitution is the promise of equal opportunity, not equal outcome."

As stated previously, none of this Court's prior orders have required defendants to implement specific programs addressing quality of education. The evidence presented indicates that the School Board has in the past regularly evaluated several areas of student performance in attempting to gauge its success in providing a quality education. It continues to do so at the present time, and there is every reason to expect that it will continue to monitor performance in the future and make adjustments in its programs where necessary.

The evidence on quality of education at the unitary status hearing focused on achievement tests, gifted programs, dropout and suspension rates and programs, and grade-point averages and college plans for graduating seniors, with reference to results achieved according to the race of the student.

Defendants regularly monitor dropout and suspension rates and have implemented programs to prevent dropouts which include providing extra counselors and teachers at the high school level. Although there is a disparity between dropout and suspension rates for whites and blacks, dropout rates for this school district are the lowest in the state for similar urban school districts (about three and one-half percent). Much of the gap in dropout rates can be explained by socioeconomic factors, according to Dr. Armor.

Although not required by state law to do so, defendants increased minority participation in the gifted program by adopting "Plan B" as soon as the state permitted school districts to devise alternate admission criteria by lowering the minimum score applicants needed to attain on a standardized test. Dr. Stevens stated that this policy had increased black enrollment in the gifted program in recent years.

Of the high school seniors who planned to attend college, 56% were white and 45% were black. The average grades for black and white students varied by six-tenths of a point. Black students in Hillsborough County meet or exceed state and national norms for several standardized tests.

Achievement tests for fourth and eighth graders show a gap between white and black students but these differences occur nationwide and are not confined to the Hillsborough County school district. Dr. Armor concluded that most of the difference was due to socioeconomic factors (poverty level, family income, one or two parent families, and the educational background of the parents). Plaintiffs' expert, Dr. Crain, disagreed with some of Dr. Armor's methodology and assumptions but ultimately agreed that socioeconomic factors probably explained most of the gap in math, but not in reading.

The evidence indicates that any disparity in achievement among students is not due to the effects of the prior segregated school system but rather to a myriad of other factors, largely socioeconomic. To require the School Board to obtain equal outcomes for all students is unrealistic. This Court's equitable powers are limited to remedying past constitutional violations.

The School Board is doing a reasonably good job of providing equal educational opportunities for all students. More importantly, it is evident that the School Board and Superintendent and staff candidly recognize that there are

deficiencies that need to be addressed and that input and involvement from all members of the community are needed to remedy these deficiencies. Any disparities that exist are not the result of the prior segregated system.

"[N]umerous external factors beyond the control of the [School board] and the State affect minority student achievement. So long as these external factors are not the result of segregation, they do not figure in the remedial calculus." Jenkins, 515 U.S. at 102 (fact that Kansas City school district was at or below national norms of achievement in some grades was not justification for court in desegregation case to require defendant school board to continue to fund quality education programs); see also Keyes v. Congress of Hispanic Educators, 902 F. Supp. 1274, 1299 (D. Colo. 1995) (racial/ethnic differences in discipline, participation in gifted programs, dropout rates and achievements, among other facets of school operation, not vestiges of dual school system existing 25 years ago; "[t]here are too many variables, including societal and socioeconomic factors, to infer causation from prior unconstitutional conduct"), appeal dismissed, 1997 WL 408050 (10th Cir. July 18, 1997).

GOOD-FAITH COMPLIANCE

In Freeman, the Supreme Court explained the importance of good faith in evaluating whether a school board should be released from court supervision:

> [A] school district [must] show its good-faith commitment to the entirety of a desegregation plan so that parents, students, and the public have assurance against further injuries or stigma . . . . [T]he good-faith compliance of the district with the court order over a reasonable period of time is a factor to be considered in deciding whether or not jurisdiction [can] be

> relinquished . . . . A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new de jure violation, and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future.

Freeman, 503 U.S. at 498 (citations omitted).

The Court must consider the testimony of various witnesses called on behalf of plaintiffs who testified that the School Board is not ready to be released from the Court's supervision. One of those witnesses was the School Board Chair, Doris Reddick, as well as the lead plaintiff in this case, Andrew Manning. Although they did not point to any specific examples, both Ms. Reddick and Mr. Manning voiced concern about what might happen in the future if Court supervision ended.

However, these opinions and the anecdotal evidence offered by plaintiffs are outweighed by the long history of compliance with the Court's Orders and the substantial evidence presented by defendants in support of unitary status.

Plaintiffs also contend that Dr. Heuer's testimony about the alleged ex parte conversations between the Court and defendants in the 1970's demonstrate defendants' lack of good-faith compliance in that "major decisions about school desegregation are based on one-time conversations, which are not clearly articulated and memorialized in court orders." (Dkt. 796 at 65) According to Dr. Heuer, the Court advised that it was not necessary to do anything in response to changes in racial enrollments at individual schools if defendants had not caused the imbalances. It is evident that the defendants tried to improve the racial balances when making boundary changes and opening and closing schools. If this advice was indeed given, there is no

inconsistency between the advice and the Court's Orders. These ex parte conversations, while unfortunate, were not initiated by defendants and do not demonstrate a lack of good faith on the part of defendants in complying with the Court's orders.

Plaintiffs also take issue with the fact that the School Board did not initiate the unitary status determination by taking a formal vote or holding public hearings but instead responded to this Court's Order directing the parties to present evidence on the unitary status issue. The fact that this inquiry was initiated by the Court, instead of defendants, is not indicative of a lack of good faith on the part of defendants. If anything, it indicates defendants' commitment to this Court's prior orders and the duties imposed by those Orders. Further, after the Court's Order was entered, defendants filed a Statement of Position which showed a readiness to seek unitary status. (Dkt. 728)[54]

The School Board has complied in good faith with this Court's desegregation orders for quite a long period of time. The testimony of the most School Board members, as well as the current Superintendent and those responsible for various facets of school operation demonstrates that defendants have accepted the principle of racial equality and will not revert back to a dual

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[54]Defendants stated that after reviewing the history of the case, the relevant court decisions, and aspects of the operations of the school system relevant to unitary status, "[d]efendants represent to the Court that the Hillsborough County School system is, and for some time, has been unitary. The Defendants therefore ask the Court to treat this Response as their request for a declaration that the system of public schools operated by the [School Board] is unitary under governing legal standards.

school system.[55]

CONCLUSION

From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination. See Dowell, 498 U.S. at 247. This precept was underscored by Justice Anthony Kennedy who authored the majority opinion in Freeman:

> Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. When the school district and all state entities participating with it in operating the schools make decisions in the absence of judicial supervision, they can be held accountable to the citizenry, to the political process, and to the courts in the ordinary course . . . . [O]ne of the prerequisites to relinquishment of control in whole or in part is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution. Yet it must be acknowledged that the potential for discrimination and racial hostility is still present in our country, and its manifestations may emerge in new and subtle forms after the effects of de jure desegregation have been

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[55]Plaintiffs contend that the defendants have failed to establish unitary status as to any Green factor as well as quality of education and good-faith compliance. Efforts to mediate the issues raised in the 1994 motion to enforce were unsuccessful. The Court's ruling on the unitary status issue, whatever that may be, will likely trigger another round of appellate litigation. It is unfortunate that the parties have been unable to resolve--or at least narrow--the legal issues in dispute. They may not be as far apart as their court filings suggest. (See, e.g., Dkt. 796 at 85)

> eliminated. **It is the duty of the State and its subdivisions to ensure that such forces do not shape or control the policies of its school systems. Where control lies, so too does responsibility.**

503 U.S. at 490 (emphasis added).

The Hillsborough County public school system is by no meansperfect, but it is in reasonably good hands. No one can predict with certainty what lies ahead if the School Board is released from court supervision. However, "a fear that a system may resegregate in the future, absent credible evidence to support those fears, does not justify a federal court's continued monitoring of the system." Stell, 860 F. Supp. at 1583 (citation omitted).[56]

The question remains whether this court must or should maintain jurisdiction over this case pursuant to Youngblood v. Bd. of Public Instruction, 448 F.2d 770 (5th Cir. 1971). In Youngblood, the district court, sua sponte, dismissed a school integration case after finding that the school system was desegregated and unitary. Plaintiffs urged on appeal that rather than dismissing the case the court should have maintained the

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[56]However, if the Court has concerns about whether defendants have desegregated the elementary schools to the maximum extent practicable, continued court supervision over student assignment could be retained while relinquishing jurisdiction over the other aspects of school operation as long as remedial action in the other areas is not necessary to achieve unitary status in the area of school assignments. A finding of the School Board's good-faith commitment to the entirety of a desegregation plan would also have to be made. See Freeman, 503 U.S. at 496-97 (incremental declaration of unitary status may be appropriate in certain circumstances).

case on the inactive docket and required the school district to file status reports. The former Fifth Circuit agreed and vacated the dismissal order. It remanded the case to the district court which was ordered to (1) reinstate the action and retain jurisdiction for not less than three school years; (2) require the school district to file semi-annual reports; and (3) not dismiss the action again without providing notice to plaintiffs and an opportunity to show cause why dismissal of the case should be further delayed. See id..

Youngblood, which is binding authority in this circuit,[57] has been interpreted to require a "three-year transitionary period" after a declaration of unitary status. Flax v. Potts, 725 F. Supp. 322 (N.D. Tex. 1989), aff'd and remanded, 915 F.2d 155 (5th Cir. 1990). In Lee v. Etowah County Bd. Of Educ., 963 F.2d 1416 (11th Cir. 1992), the Eleventh Circuit interpreted Youngblood more narrowly and held that after a school system has implemented a desegregation plan the district court must retain jurisdiction for a sufficient time--not less than three years--after which it may hold a hearing to determine if unitary status has been achieved. See id. at 1421.

Due to what may be an ambiguity in the law,[58] and

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[57]See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981).

[58]Compare Dowell, 498 U.S. at 248 ("[A] federal court's regulatory control of [public school] systems [should] not extend beyond the time required to remedy the effects of past intentional discrimination.") (citations omitted) with Freeman, 503 U.S. at 490 ("[S]o too must a court provide an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance. A transition phase in which control is relinquished in a gradual way is an appropriate means to this end.")

because the parties have not briefed the issue of whether a transition phase is necessary after unitary status is attained, the parties shall do so within the time period for filing objections to the Report and Recommendation.

It is therefore **RECOMMENDED:**

(1) For the reasons previously stated, this Court should find that the defendants have demonstrated that the public school system of Hillsborough County has attained unitary status and should be released from Court supervision pursuant to such further Orders as may be appropriate under the circumstances.

/s/
ELIZABETH A. JENKINS
United States Magistrate Judge

DATED: August 26th, 1997.

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. § 636(b)(1).

Copies to: Counsel of Record
Hon. Elizabeth A Kovachevich, Chief Judge

Arguably, the showing of a good-faith commitment to the entirety of a desegregation plan would make a transition phase unnecessary. See Freeman, 503 U.S. at 498.

Appendix 1*

POPULATION IN HILLSBOROUGH COUNTY 1970-1990

All Persons

Year	Total	White	Black	Other	Spanish Origin (Any race)
1970	490,265	422,119	66,648	1,498	38,717
1980	646,960	546,575	86,464	13,921	64,199
1990	834,054	690,352	110,283	33,419	106,908

Persons Age 0-17

1970	164,278	135,344	28,527	407	**
1980	176,030	138,945	33,007	4,078	17,762
1990	202,274	152,900	39,163	10,211	28,806

*Taken from DX 2 at 13, W.A.V. Clark's report on Demographic Change And School District Impacts In Hillsborough County (June 1996).

**no data

Appendix 2*

TABLE OF SCHOOL ATTENDANCE ZONE 0-17 AGE RESIDENTIAL POPULATION COMPOSITION FROM CENSUS TRACT AND BLOCK STATISTICS, 1970-1990

School area	1970 **		1980		1990	
Cleveland	1657/46	(2.8)	1544/639	(41.3)	1578/654	(41.4)
Edison	1788/343	(19.2)	1463/584	(39.9)	836/590	(70.5)
Graham	1687/347	(22.2)	1288/462	(35.9)	1220/523	(42.9)
Oak Park	1649/117	(7.1)	1703/664	(39.0)	1580/897	(56.8)
Robles	2247/292	(13.0)	2496/781	(31.3)	2875/2054	(71.4)

*Taken from DX 2 at 16, W.A.V. Clark's report on Demographic Change And School District Impacts In Hillsborough County (June 1996).

** Total, black and percent black resident population

Appendix 3*

TABLE OF SCHOOL ATTENDANCE ZONE 0-17 AGE RESIDENTIAL POPULATION COMPOSITION FROM CENSUS TRACT AND BLOCK STATISTICS, 1980-1990

School area	1980 **		1990	
Cahoon	1882/396	(21.0)	2015/677	(33.5)
Clair Mel	3211/523	(16.3)	2832/1112	(55.1)
Foster	1397/438	(31.3)	1215/637	(52.4)
Shaw	2330/312	(13.4)	2696/911	(33.8)
Sulphur Sprgs	1600/242	(15.1)	2771/1431	(51.6)
Witter	1523/267	(17.5)	1809/743	(41.1)
West Tampa	1465/305	(20.8)	1379/436	(31.6)
Dowdell Jr	7494/2070	(27.6)	6572/2584	(39.3)
Van Buren Jr	10998/1613	(14.7)	12583/4983	(39.6)

*Taken from DX 2 at 17, W.A.V. Clark's report on Demographic Change And School District Impacts In Hillsborough County (June1996).

**-Total, black and percent black resident population

Note: Van Buren includes all of the area of Sligh but only junior high students attend Van Buren.

Report and Recommendation of Magistrate Judge
June 23, 1995

United States District Court, M.D. Florida.

Andrew L. MANNINGS, et al., Plaintiffs,
v.
THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, Florida (formerly Board of Public Instruction of Hillsborough County, Florida), et al., Defendants.

No. 58-3554-CIV-T-17A.

June 23, 1995.

Marianne Engelman Lado, Jacqueline A. Berrien, NAACP Legal Defense & Educational Fund, Inc., New York, NY, Victor A. Bolden, Wiggin & Dana, New Haven, CT, Warren H. Dawson, Dawson & Griffin, P.A., Tampa, for Andrew L. Manning, a minor, by his father and next friend, Willie Mannings, Shayron B. Reed, by his father and next friend, Sanders B. Reed, Sandra E. Reed, by her father and next friend, Sanders B. Reed, Nathaniel Cannon, minor, by his father and next friend, Nathaniel Cannon, Sr., Norman Thomas Cannon, minor, by his father and next friend, Nathaniel Cannon, Sr., Tyrone Cannon, minor, by his father and next friend, Nathaniel Cannon, Sr., Darnel Cannon, minor, by his father and next friend, Nathaniel Cannon, Sr., Gail Rene Myers, a minor, by her father and next friend, Randolph Myers, plaintiffs.

Thomas M. Gonzalez, Thompson, Sizemore & Gonzalez, P.A., Walter Crosby Few, Few & Ayala, P.A., Tampa, for Board of Public Instruction of Hillsborough County, FL, Clyde McLeod, AL Chiaramonte, John E. Coleman, member of Board of Public Instruction of Hillsborough County, FL, Marvin Green, J. Crockett Farnell, Supt., Hillsborough County, FL, School Board

of Hillsborough County, Formerly Board of Public Instruction of Hillsborough County, Florida, defendants.

REPORT AND RECOMMENDATION

JENKINS, Magistrate J.

*1 THIS CAUSE comes before the Court on Plaintiffs' Amended Motion to Enforce Court Order and Consent Order and for Further Relief and Memorandum (docs.601, 602), and Defendants' Response (doc. 605), Plaintiffs' Proposed Findings of Fact and Conclusions of Law (doc. 688), Defendants' Proposed Findings of Fact and Conclusions of Law (doc. 689) and the other submissions of the parties pertinent to the motion.[1]

An evidentiary hearing was held on October 24 and was concluded on November 22, 1994. Thereafter, the parties were ordered to mediation in an effort to resolve their disputes. No settlement was reached and on April 20, 1995 closing arguments were presented.

Plaintiffs ask that the Court 1) enforce the October 24, 1991, Consent Order and the May 11, 1971, Opinion and Order by requiring Defendants to take such steps as may be necessary to prevent the establishment and operation of West Tampa Elementary School, part of the recently implemented Jefferson Cluster, as an additional racially identifiable black school in Hillsborough County in the 1994-95 (and succeeding) school years; 2) require Defendants to take immediate effective steps to desegregate currently existing racially identifiable schools;

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[1] This matter was specifically referred to the magistrate judge by Order of the Honorable Elizabeth A. Kovachevich, United States District Judge.

and 3) require Defendants to comply with the Consent Order and 1971 Order in the formulation and implementation of the remaining cluster assignments pursuant to their middle school plan.[2]

For the following reasons, the amended motion to enforce should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND[3]

On May 11, 1971, the Court entered an Order requiring the Hillsborough County School Board to prepare and submit for approval a comprehensive plan for desegregating the school system ("1971 Plan").

On July 2, 1971, the Court approved for implementation the submitted comprehensive plan and retained jurisdiction to take further action as necessary. The 1971 plan was designed to desegregate student enrollment in grades 1-12, as required by the Court; kindergarten was not included nor was pre-school.

The 1971 Plan required the conversion of twelve formerly all-black "inner city" elementary schools[4] to single-grade attendance centers serving the 6th grade. Each

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[2]Plaintiffs also sought to require Defendants to modify the format of their annual reports, but the parties indicated during the course of the hearing that the issue has been resolved.

[3]Unless otherwise indicated, the facts in this section are those to which the parties stipulated prior to the evidentiary hearing on plaintiffs' amended motion to enforce. (doc. 657, p. 11-20)

[4]Bryan, Carver, College Hill, Cuesta, Dunbar, Jackson Heights, Lomax, Meacham, Orange Grove, Potter, Shore and Williams.

elementary grade-level (1-5) attendance area of each of these formerly all-black elementary schools was divided into two to five "satellite areas."[5] Students residing in each of these "satellite areas" were assigned to attend a formerly white school, to which they were transported for grades 1-5.

By October 27, 1971, Defendants had desegregated all Hillsborough County schools. There were no majority-black schools and only one school, Lee Elementary, had more than a 40% black student population. (T2-53-54)[6]

Each year following implementation of the 1971 Plan, the School Board filed at least two reports with the Court and furnished copies of the reports to Plaintiffs. The first report (usually submitted in the fall) provided enrollments by race and grade and faculty assignments by race at each school serving grades 1-12 in the system. The second report enumerated changes in student assignment, if any, proposed for the following school year.

***2** The student assignment report included, *inter alia,* boundary changes occasioned by overcrowding and student assignment modifications necessitated by the construction of new schools. The reports included projections of anticipated enrollments, by race, at schools affected by the proposed changes.

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[5]A satellite zone is an area which is not contiguous with the main attendance zone surrounding a school. May 11, 1971 Order, p. 29, n. 41.

[6]References to the transcript of the evidentiary hearing held on October 27, 1994 (doc. 663) and concluded on November 22, 1994 (doc. 671) are indicated as "T1" or "T2", respectively, followed by the page number.

At least since January 14, 1975, the Court has not directed the School Board to prepare a supplemental plan or to take any action with respect to the racial composition of any of its schools, including, but not limited to, schools whose enrollments were more than 50% black.

Plaintiffs have not, from the date of implementation of the 1971 Plan until June, 1994, filed any written objections with the Court respecting the actual or projected enrollments of any schools in Hillsborough County, including schools whose enrollments were more than 50% black.

Plaintiffs did object in 1980 to the closing of George Washington Junior High School and Glover Elementary School (for reasons other than racial composition), proposed actions which were approved by the Court after a hearing on plaintiffs' objections.

Plaintiffs also objected in 1990 (for reasons other than anticipated racial composition of enrollments) to the proposed conversion of Blake 7th-grade center to a magnet high school, a proposal which the Court disapproved (without prejudice to subsequent resubmission as part of a comprehensive restructuring plan) by Order of January 23, 1991.

The School Board has not requested a finding of partial or full unitary status by the Court and/or the vacation, in whole or in part, of the previous Orders of the Court. The Court has therefore not had occasion to make, nor has it made, a determination whether all vestiges of the prior racially discriminatory dual school system in Hillsborough County have been eliminated to the extent practicable.

Since the 1977-78 school year, the School Board has made more than 300 modifications in student assignments to relieve overcrowding, to accommodate the opening of newly

constructed facilities, or for other reasons, but not for the purpose of affecting the racial ratio of a school.

When making assignment changes to relieve overcrowding or to accommodate new construction, the School Board has taken into account the racial mix within the new boundary and the effect of the boundary changes on the enrollment ratios at the affected schools.

In addition, in making assignment changes to deal with problems of overcrowding or with new school construction, the district, where practicable, reassigned, or divided and partially reassigned, existing satellite zones (those originally created in 1971) in a manner that moved enrollments toward the system-wide ratio.

In particular, when the School Board constructed a new facility in a suburban area having a small resident black student enrollment within the contiguous zone created surrounding the facility, it would reassign pre-existing satellite zones to increase the number of black students assigned to the new facility.

*3 In modifying student assignments to relieve overcrowding or in connection with the opening of a new facility, the School Board has since the 1975-76 school year created non-contiguous zones or satellites in at least seven instances.

The School Board has never created a new non-contiguous or satellite zone solely to alter the racial enrollment ratio at a school, including those schools with majority-black enrollments.

Since 1986, the School Board has not initiated any boundary changes, (not otherwise being considered for reasons such as overcrowding or the opening of a newly constructed

school facility) for the purpose of altering the racial enrollment ratio at a school, including at schools that had majority-black enrollments.

In November 1989, Superintendent Walter Sickles appointed a task force to investigate and make recommendations for reorganizing the school system and implementing a middle school program.

One of the stated goals of the task force was to retain a desegregated school system.

In late 1990 or early 1991, the School Board invited plaintiffs and their counsel to consider the tentative middle school plan being developed by the Task Force.

During the first six months of 1991, several meetings between school board staff and plaintiffs' counsel took place (concerning the middle school plan). Plaintiffs' educational and desegregation consultant, Dr. Leonard Stevens, also participated in several of the meetings including meetings held on July 16, 1991.

Following the July 16, 1991 meeting, a formal report entitled "Middle School Task Force Report 3, July 1991" (Task Force Report) was submitted to and approved by the School Board and subsequently transmitted to plaintiffs' counsel on August 20, 1991.

More than two months later, the Task Force Report was attached to and made part of the Consent Order submitted and executed by counsel for plaintiffs and defendants which was approved and entered by the Court on October 24, 1991. (PX 48)

The Task Force Report proposed modifications (projected to be implemented over a seven-year period) of grade organization and student assignments in the Hillsborough County school system to accommodate the establishment of middle schools. (Consent Order, p. 2)

Implementation of the middle school concept involved creating attendance "clusters" which grouped elementary and middle schools around the high school which those students would ultimately attend. Each of the 17 clusters was thus named for the high school which was the basic unit, e.g. the "Jefferson [High School] Cluster". (Task Force Report, p. 10)

As described in the Task Force Report, the Jefferson Cluster was to be implemented between 1996 and 1998.

Subsequent to the entry of the Consent Order, the School Board decided to implement the Jefferson Cluster in the 1994-95 school year.[7]

The Task Force Report indicated that the Jefferson Cluster was to be implemented by changing the grade structure of West Tampa Elementary School from a K-6 facility to a K-5 school.

***4** However, two changes in the School Board's 1994-95 implementation plan for the Jefferson Cluster differed from the plan in the 1991 Task Force Report.

The implementation plan, which was approved by the School Board and carried out pursuant to the parties' Agreed

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[7]Apparently, delays in construction in the East Bay Cluster resulted in a decision to implement the Jefferson Cluster earlier than anticipated. (T1-77)

Interim Order, provided that West Tampa Elementary School (West Tampa) will continue to operate as a K-6 school until the "Blake/Just" or "Downtown" Cluster is implemented.[8]

Only part of the sixth-grade students, those who walked to school, were retained at West Tampa. Those students were projected to attend Just Middle School which is part of the Blake (downtown) cluster and Just was not ready to accept elementary students yet because the Blake cluster had not been implemented. (T2-122-123)

Furthermore, although the Task Force Report envisioned that the area of the Jefferson Cluster formerly assigned as a satellite zone to Mabry Elementary School would be assigned to Dickenson Elementary, that satellite zone is instead assigned to Bay Crest Elementary School under the 1994-95 implementation plan.

As of October 19, 1993, there were one hundred fifty-one (151) public schools in Hillsborough County: 111 are elementary schools, 26 are junior high/middle schools and 14 are high schools. (PX 23)[9] Defendants state that there are now one hundred sixty (160) public schools in Hillsborough County.

Approximately sixteen (16) of the public schools, primarily elementary schools, have black student enrollments of 40% or more. (doc. 601, p. 2)

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[8]At closing argument on April 20, 1995, defendants stated that the temporary measure of retaining grade 6 at West Tampa will end at the close of the school year in 1996.

[9]Exhibits introduced by plaintiffs at the evidentiary hearing will be indicated by the letters "PX"; those introduced by defendants will be indicated by the letters "DX".

The percentage of black students enrolled in the school system has remained fairly stable since 1971 at around the 20% level; currently the system-wide percentage of black students attending elementary schools is about 23%, about two percentage points higher than in 1971. (T1-110).

II. DISCUSSION

In their amended motion to enforce, Plaintiffs seek to require Defendants to take affirmative steps to prevent the establishment and operation of West Tampa Elementary School as an additional racially identifiable black school in Hillsborough County in the 1994-95 (and succeeding) school years. Plaintiffs contend that Defendants did not comply with either the 1971 Order or the 1991 Consent Order in implementing the Jefferson Cluster in the 1994-95 school year. Further, plaintiffs state that Defendants have a continuing affirmative duty to prevent the creation or maintenance of any racially identifiable schools within Hillsborough County, regardless of whether Defendants fully complied with the 1971 Order in directing the immediate desegregation of Hillsborough County public schools.

As of December, 1993, West Tampa had a black student enrollment of 41%, which, according to the Task Force Report, was projected to be the enrollment once the Jefferson Cluster was implemented. However, the percentage of black students at West Tampa is currently approximately 48% (T1-113)

Under the Court's 1971 Order:

> (a) The plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county now having a school population at least 50% black.

> *5 (b) In preparing the plan the school board shall begin with the proposition that a white-black ratio of 86%/14% in the senior high schools, 80%/20% in the junior high schools, and 79%/21% in the elementary schools would be the most acceptable and desirable form of desegregation.

The Consent Order into which the parties entered in October 1991 ordered that any modifications in student assignment patterns resulting from demographic or other changes must be made with an eye toward "minimiz[ing] (to the extent practicable) the number of schools which deviate from the system-wide student enrollment ratios ." Consent Order, p. 6.

A. *The 1971 Order*

Plaintiffs contend that the 1971 Order requires Defendants to prevent and/or remedy the reoccurrence of "racially identifiable" schools.

Approximately sixteen (16) of the public schools in Hillsborough County fall into the category of racially identifiable schools, according to Plaintiffs and their consultant, Dr. Stevens, and the definition they use (40% or more black students).

While not denying the statistical evidence cited by Plaintiffs, Defendants disagree with Plaintiffs' definition of a racially identifiable school as a school having a population of black students of forty-percent (40%) or more. Defendants also maintain that the 1971 Order required the desegregation of all schools and that such desegregation had occurred as of

December, 1971.[10]

Racial Enrollments Generally

Plaintiffs do not dispute that Defendants initially complied with the 1971 Order in desegregating the public schools of Hillsborough County.

In *Harris v. Crenshaw County Bd. of Educ.*, 968 F.2d 1090, 1095 (11th Cir.1992), the Eleventh Circuit reiterated the obligation of a school board operating under a desegregation order:

> Until a school system achieves unitary status, it has an affirmative duty to eliminate the effects of its prior unconstitutional conduct. To fulfill this duty, school officials are obligated not only to avoid any official action that has the effect of perpetuating or reestablishing a dual school system, but also to render decisions that further desegregation and help to eliminate the effects of the previous dual school system.

Id. at 1094-95 (footnotes omitted). Also, "[i]f a school system's violation of its duty to desegregate has been the cause of a racial imbalance in student attendance, then the condition must be remedied". *Id.* at 1096, *citing Freeman v. Pitts*, 503 U.S. 467 (1992).

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[10]The response to the amended motion to enforce incorrectly asserts that this Court has "cleansed" the School Board of the "mortal sin of de jure discrimination based on race." (doc. 606, p. 10) However, this statement is not reflective of defendants' testimony at the hearing and the error appears to be counsel's.

However, the "constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 24 (1971).

In *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 434 (1976), the defendants sought, *inter alia,* to eliminate the Court-mandated "no majority of any minority" requirement, i.e., no school in the district could have a majority enrollment of any minority group. The district court denied the defendants' motion in that regard, and the Ninth Circuit affirmed. The Supreme Court reversed, finding that the district court erred in interpreting its order to ***6** contemplate the 'substantive constitutional right [to a] particular degree of racial balancing or mixing' which the Court in [*Swann v. Board of Education*, 401 U.S. 1 (1970)] expressly disapproved. (Citation omitted). It became apparent, at least by the time of the 1974 hearing, that the District Court viewed this portion of its order not merely as a "starting point in the process of shaping a remedy," which *Swann* indicated would be appropriate, (citation omitted), but instead as an "inflexible requirement," (citation omitted), to be applied anew each year to the school population within the attendance zone of each school.

Although acknowledging that "[i]t may well be that petitioners have not yet totally achieved the unitary system contemplated by . . . *Swann,*" the Supreme Court continued:

> But that does not undercut the force of the principle underlying . . . *Swann.* In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished *that* objective. That being the case, the District Court was not entitled to require the

> [Pasadena Unified School System] to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Spangler, 427 U.S. at 436-37.

The Supreme Court's concern in *Spangler* was the inflexibility of the "no majority of any minority" requirement. Based on *Spangler,* it is clear that Defendants have no continuing duty to maintain a particular black-white ratio on a school-by-school basis, year in and year out, including the 80%/20% ideal set forth in the 1971 Order.

Plaintiffs' argument that the Defendants have an ongoing duty to redesegregate schools in which minority enrollment approaches 50% essentially seeks to impose a "no majority of any minority" rule in this case. As shown above, such a rule cannot be enforced.

Furthermore, the 1971 Order did not impose such a mandate on Defendants. In formulating their desegregation plan, Defendants were ordered to follow certain guidelines, including:

> The plan shall have as its primary objective the abolition of segregation in all schools in the county, and in particular it shall aim at desegregation of all schools in the county *now* having a school population at least 50% black.

> (b) In preparing the plan the school board *shall begin* with the proposition that [the 80/20 ratio] would be the most acceptable and desirable form of desegregation.

1971 Order, pp. 43-44 (emphasis added).

On July 2, 1971, the Court found that the plan submitted by Defendants "fully complies with the Court's Order of May 11, 1971, and the law and will result in the establishment of a unitary school system in Hillsborough County, Florida." Order, p. 9. The highlighted language does not support Plaintiffs' reading of the 1971 Order as imposing an ongoing duty to maintain a particular racial balance once Defendants have effected compliance with its terms. Neither the literal terms of the 1971 Order nor Supreme Court precedent justifies this view.

*7 As noted subsequently, Defendants have implemented changes in the desegregation plan, with the approval of plaintiffs and this Court, as a result of the Task Force Plan recommending the single-grade centers with middle schools and organizing all schools into geographic clusters. In this phase, which commenced in 1991, Defendants contend that they endeavored to bring as many schools as possible in line with the 80/20 ratio.

Thus, while Defendants have not been mandated to maintain a particular racial balance at each school, they have utilized the 80/20 ratio identified in the 1971 Order as a guide in formulating student attendance zones for district schools.

In summary, there is nothing in the 1971 desegregation order which requires the School Board to periodically adjust the racial enrollment at particular schools on an annual or less frequent basis once the initial goal of desegregation of student attendance patterns has been achieved.

The definition of a racially identifiable school

The parties also dispute what measure determines whether a school is "racially identifiable".

Plaintiffs point out that this Court has stated that "[a] school with a majority black population would undoubtedly be identifiable as a black school. The racial identification of schools is the antithesis of a unitary school system." *Mannings v. School Board of Hillsborough County, Florida*, 151 F.R.D. 133, 136 (M.D. Fla.1993). That published decision concerned a motion to intervene by persons objecting to the middle school Task Force Report. In the course of addressing the proposed intervenors' objections that black students cannot maintain a majority of the school population in black communities, the Court made the above-quoted statement.

Defendants argue that the precise definition of a racially identifiable school was not at issue in the motion to intervene and the Court's pronouncement was dicta. Moreover, Defendants argue that inquiry into racial identifiability of its schools is premature at this point because the Court has not yet been asked to determine whether the Hillsborough County public school system has attained unitary status.

The current issue before the Court as to the 1971 Order is whether defendants have an ongoing duty to maintain a particular racial balance at each school since 1972. The clear answer to that is "no".

The determination of whether a school system has attained unitary status involves consideration of a number of factors, including the administration, student assignment, personnel, extracurricular activities and resource allocation for each school, as well as the districting of the entire school system, and whether the school system is proceeding to

desegregate its schools in good faith. *Green v. County School Bd. of New Kent County, Va.*, 391 U.S. 430, 436 (1968). The ultimate goal is a school system with schools that are racially nonidentifiable, i.e. not white schools and black schools, but rather just schools. *Id.* at 441.

***8** In *Freeman,* the Court observed that "as in most cases, where the issue is the degree of compliance with a school desegregation decree, a critical beginning point is the degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the race in the district as a whole." *Freeman*, 112 S. Ct. at 1437. *Freeman* held that a determination of unitary status can be made incrementally before full compliance has been achieved in every area of school operations. *Id.* at 1445.

While the instant litigation does not involve a determination of unitary status, this Court may wish to determine what percentage of minority or majority race students shall be used to define racially identifiable schools in Hillsborough County.

In doing so, this Court does not write on a blank slate. As noted, a definition of majority-black students was suggested in the 1993 *Mannings* order denying the motion to intervene. 151 F.R.D. at 136. However, the definition of racial identifiability was not directly at issue in that motion.

The May 11, 1971 Order finding that the Hillsborough County school system remained racially segregated referred to "a white school" as "a school that is attended by white students only, or whose student body is at least 95% white" and a "black school" as "a school with a student population that is all black or at least 90% black." May 11, 1971 Order, p. 11, n. 13. Nevertheless, the Court (the Honorable Ben Krentzman)

ordered defendants to immediately desegregate "all schools in their school system where at least half the students are black." May 11, 1971 Order, p. 39, 43)

Plaintiffs' consultant, Dr. Stevens, defines a racially identifiable school as one which has 40% or more black students because "once you get schools that are running 20 points or more at variance from the district-wide average, racial identifiability is a fact of life and becomes a reality for that school." (T2- 110) He states that one-third of all black elementary students in Hillsborough County are attending schools which are more than 40% black. (T2-218)

The courts have wrestled with the definition of what constitutes a racially identifiable school. *See e.g. Morgan v. Nucci*, 831 F.2d 313, 320 (1st Cir.1987) (declining to consider whether 80% or 90% minority enrollment makes a school racially identifiable while stating that 75% was too low a figure for Boston schools); *see also Riddick by Riddick v. School Board of City of Norfolk*, 784 F.2d 521, 533 (4th Cir.) (a racially identifiable school has fewer than 30% or more than 70% minority or non-minority students), *cert. denied*, 479 U.S. 938 (1986); *Yarborough v. Hulbert-West Memphis School District No. 4*, 457 F.2d 333, 334 (8th Cir.1972) (no fewer than 30% of the minority race at each school); *Diaz v. San Jose Unified School District*, 633 F. Supp. 808, 813 (N.D.Cal.1989) (a desegregated school is one with at least 20% majority and at least 20% minority students; noting expert testimony that "an ethnic group would risk continued isolation if it did not represent at least 20% of the student body at a given school"), *aff'd* 861 F.2d 591 (9th Cir.1988).[11]

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[11]One Eleventh Circuit opinion which was subsequently vacated stated in a footnote that a school which was 64% black was clearly not racially identifiable while a school which would be 94%

*9 Some courts have focused on the extent to which black student enrollments vary from district-wide enrollment ratios. *See Little Rock School District v. Pulaski County Special School Dist. No. 1*, 839 F.2d 1296, 1307 (8th Cir.1988) (a racially identifiable black elementary school is one having a black student enrollment in excess of the applicable range of variance from the system-wide percentage of black students, *citing Penick v. Columbus Board of Education*, 583 F.2d 787, 799 (6th Cir.1978), *aff'd* 443 U.S. 449 (1979)); *Stell v. Board of Pub. Educ. for Savannah*, 860 F. Supp. 1563, 1574-80 (S.D. Ga.1994) (aim of desegregation order was to bring all schools, to the extent practicable, within +/-20 percent of district-wide ratio).

The *Stell* decision supports the approach suggested by plaintiffs' expert, Dr. Stevens. However, his definition of a racially identifiable black school as one having 40% or more black students (20 basis points above the district-wide norm) is a standard which has never been articulated or adopted by this Court. Even if Dr. Stevens' definition is used, 43% instead of 40% would be arguably be the correct measure for elementary schools whose black student population is approximately 23% at present.

Defendants have not proposed a definition of a racially identifiable school although Dr. John Miliziano, the Superintendent's Administrative Assistant, testified that he considers a school with more than 50% black students or

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black clearly would be. *Lee v. Macon County Bd. of Educ.*, 970 F.2d 767,774 n.23 (11th Cir.1992), *vacated*, 987 F.2d 1521 (11th Cir.1993).

students of one race to be identifiable by race. (T2-146)[12] Dr. Miliziano has worked for the School Board for a number of years and one of his chief responsibilities since becoming Administrative Assistant has been to monitor and work with the desegregation plan, in particular the cluster plan. (T2-44)

Neither plaintiffs nor their consultant have raised any objection to racial enrollments at schools where the percentage of black students is significantly lower than the district-wide ratio. Rather, they ask Defendants to take remedial action as to those schools which plaintiffs contend are racially identifiable as black schools.

In their amended motion to enforce, plaintiffs have identified eight schools with 50% or more black enrollment[13] and eight with 40% to 50% black enrollment.[14] This information is from the 1993 Annual Report which Defendants filed with the Court. (doc. 601, p. 2)

If this Court adopts the definition suggested in the 1993 *Mannings* order, then all schools in Hillsborough County

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[12]Plaintiffs point out that another School Board official, Kenneth Allen, Director of Pupil Administrative Services, testified that he does not have a working definition of a racially identifiable school but has operated under the assumption that "if there are students of mixed race at school, that is a desegregated school." (T1-234). Mr. Allen's responsibilities include formulating attendance boundaries for the schools contained within each cluster. (T1-222).

[13]Those schools are: Robles (90%), Edison (74%), Sulphur Springs (70%), Oak Park (66%), Graham (63%), Cleveland (59%), Foster (57%), Witter (56%), and Van Buren (50%).

[14]Clair Mel (48%), Shaw (48%), Cahoon (47%), Dowdell (46%), Sligh (43%), West Tampa (41%), and DeSoto (40%).

having black student populations of more than 50% shall qualify as racially identifiable schools. Approximately eight schools fit this definition. West Tampa is not one of those although it does fit Dr. Stevens' definition of a racially identifiable school because its black student enrollment is more than 40%.

Official Policy and Student Attendance Zones

A racial imbalance in student attendance zones is not tantamount to a showing that a school district is in noncompliance with the decree or its duties under the law. Once the racial imbalance due to the *de jure* violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors. *Freeman*, 112 S. Ct. at 1446. (citations omitted).

***10** If the unlawful *de jure* policy of a school system has been the cause of the racial imbalance in student attendance, that condition must be remedied. The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation. *Id.* at 1447.

Due to the parties' disagreement over the meaning and scope of the 1971 Order, Defendants were not required to prove at the evidentiary hearing that the increased black enrollments at the sixteen schools identified by plaintiffs were due to demographic changes. However, such a showing is arguably unnecessary in the absence of some official school board action which could have created the racial imbalance.

Defendants agree that whenever the School Board takes action such as constructing new schools, closing old or unneeded schools, or changing attendance boundaries to accommodate educational needs, it must consider the racial mix resulting from the new or altered attendance patterns and refrain

from any action which would lead to the reestablishment of a segregated system.

Defendants deny that they have an obligation to compensate for a particular student enrollment ratio at a school absent any School Board action directly altering the attendance zone of the school in question.[15]

The stipulated facts indicate that Defendants have initiated boundary changes only for the purpose of relieving overcrowding or populating new schools, and have never altered attendance zones or created satellites solely to alter the racial enrollment ratio at a school, including those with a majority black enrollment. Nor has the School Board ever created a new school or changed boundaries to create a school that was over 50% black. (T2-146)[16]

Plaintiffs contend that Defendants have taken a continuous series of district-wide School Board actions (such as attendance zone modifications, new construction, addition of portable classrooms and use of special assignments) that have affected the racial enrollments of schools.

The Special Assignment Policy

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[15]Defendants argue that they understood the 1971 Order to mean that they need not compensate for any changes in enrollment ratios not caused by a boundary change and attempted to introduce evidence at the hearing of alleged *ex parte* communications to this effect between the District Judge formerly presiding over this case and a former school board employee. This evidence was ruled inadmissible.

[16]The School Board uses the term attendance zones and boundaries interchangeably. (T2-150)

At the evidentiary hearing on the motion to enforce the only School Board action specifically addressed by Plaintiffs was the student special assignment policy established in the 1971 Order. This Court has not altered Defendants' obligations under this policy since that time.

The Court's 1971 Order prohibits the School Board from granting transfers except in six situations: (1) a voluntary transfer from any school in which the student is a member of the majority race of the student population to the closest school to the student's residence in which the student is in a minority; (2) a recommendation by the juvenile court; (3) the needs of exceptional children, as that term is defined by state law; (4) to allow the children of Defendants' faculties and staff to attend school where one of their parents worked; (5) to attend vocational school; and (6) severe hardship.

The 1971 Order also directed that special assignments were to be made "without regard to race, except that special attention will be given to ensure that transfers are not approved which are made for the purpose of avoiding desegregation." 1971 Order, p. 2. The Court also appointed a Bi-Racial Advisory Committee to act as an advisor to the School Board regarding transfers, school zones, and future site locations among other areas.

***11** The Bi-Racial Committee considers all transfer requests except for those from juvenile courts. In the case of transfers under grounds (3), (5), and (6), the School Board may approve such transfers only after considering recommendations by the Bi-Racial Committee. Transfer requests made under grounds (1) and (4) were to be reported to the Bi-Racial Committee by the Board.

Data on how the special assignments affect the racial balances at each school is collected by the School Board on an

annual basis. (T2-70-71) The Fourth Annual Report, filed on April 10, 1995 (doc. 695) contains the most current statistics for each school in Hillsborough County concerning special assignments. This Report was submitted after the evidentiary hearing on plaintiffs' amended to enforce and has therefore not addressed to any extent by the parties in their submissions. This data is not subdivided by the category of the transfer request, e.g. severe hardship, exceptional children needs, etc. (Fourth Annual Report, p. 97-100) For some unknown reason, the Third Annual Report does not include this data on special assignments.[17]

Plaintiffs' argument that the School Board must deny special assignment requests from students whose race constitutes more than 40% of the enrollment of the school they wish to attend (or whatever percentage this Court finds makes a school racially identifiable) is directly contrary to the Court's direction that requests for transfers must be considered without regard to race (except for transfers made for the purpose of avoiding desegregation).

Even Dr. Stevens did not classify the School Board's long-standing interpretation of the policy (to grant hardship special assignment requests without regard to race) as a violation of the 1971 Order; he felt that the Court should "revisit" the issue because that interpretation was counterproductive to desegregation. (T1-190)

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[17]Although the Third Annual Report filed in April 1994 contains a similar section, no data is included for special assignments in the copy of the report filed with the Court; rather duplicates of a report on students transported for desegregation purposes is included. (Third Annual Report, p. 105-114)

At the hearing, the only special assignment requests addressed by plaintiffs were those made by parents of black children who wanted their children to remain at West Tampa Elementary because of neighborhood child care facilities. Plaintiffs do not contend that these requests were made by these parents for the purpose of avoiding segregation, but state that Defendants must deny such special assignment requests from black parents if necessary to maintain a certain race ratio, e.g. to keep the black enrollment at West Tampa below 40%, irrespective of the hardship which would be caused by denial of those requests.

Under the current policy, Defendants are prohibited from considering race in deciding special assignment requests; Plaintiffs have not shown that Defendants have violated any provision of the Court's 1971 Order regarding special assignments.

Based on the present record, it does not seem advisable for this Court to modify the special assignment policy to require denial of hardship requests if necessary to maintain a particular race ratio at a school. It is a fact of life that many parents must rely on after-school care for their children, and there is no denying that failure to accomodate such requests would lead to severe hardship in many cases.

*12 Based upon the data provided in the Fourth Annual Report, it is clear that the special assignment requests as a whole do not have a significant impact on racial enrollments on the eight majority-black schools identified in plaintiff's amended to enforce. All of these schools, with one exception would still be majority-black schools, even without the special assignments. That exception is Van Buren, the only junior high school among these eight schools, which has a 52/48 ratio and would have a 50/50 ratio without the special assignments. Of the other seven majority-black schools, the increase in black

enrollments caused by special assignments ranged from 1% (Oak Park and Whitter) to 7% (Robles).

Accordingly, Plaintiffs have not established that Defendants have taken official action with respect to the special assignments policy, with the intent to return to a dual school system or hinder desegregation.

Plaintiffs' Prior Actions and Representations

Even if such an affirmative duty to prevent racially identifiable schools existed once initial compliance with the desegregation order was achieved (even in the absence of any official school board policy), this Court should not ignore Plaintiffs' silence on this very issue.

It is undisputed that by the end of 1971 Defendants had desegregated all Hillsborough County schools, and there were no schools having a majority black student population and only one which was at 40-41%, Lee Elementary. (T2-53-54). In subsequent years, the percentage of black students increased at some schools.

Plaintiffs have been served with copies of the Annual Reports each year since entry of the 1971 desegregation order and the statistics in the Annual Reports indicated the racial enrollments at each Hillsborough County school, including those which greatly exceeded the 20/80 ratio recommended by the Court.[18] Yet, between 1975 and 1994, a period of almost

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[18]Defendants' Proposed Findings of Fact and Conclusions of Law (doc. 689, p. 6-9) summarize the pertinent information in the Annual Reports with respect to schools which had black student populations of 40% or more. Copies of the Annual Reports were also introduced as exhibits at the evidentiary hearing. Defendants do not

twenty years, Plaintiffs filed no objection nor otherwise complained to the Court about the existence of "racially identifiable schools," even though such schools had existed within the system (according to plaintiffs' definition) almost continuously since 1971.

Moreover, in late 1990, Defendants sought permission from the Court to establish a magnet school at Hillsborough High School. Plaintiffs objected to this proposal and stated in a written response filed with this court that "the schools in Hillsborough County are desegregated under the existing decrees and the plan they incorporate."

That eight Hillsborough County schools have become majority (more than 50% black) since 1971 does not demonstrate that Defendants have violated this Court's 1971 Order or have failed in their affirmative obligation to eliminate the effects of the School Board's prior discriminatory and unconstitutional conduct.[19] Focusing on the school district as a whole, the number of majority-black schools is only about five percent of the schools within the district or ten percent if plaintiffs' measure of racial identifiability (more than 40% black) is used.[20]

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dispute the accuracy of this information or their counsels' awareness of it.

[19]If this Court concludes that Defendants have the burden of establishing that the racial imbalance at these schools is not the result of prior *de jure* conduct, then the parties are entitled to an evidentiary hearing on this issue. By prior stipulation, that issue was not addressed at the hearings held thus far on plaintiffs' amended motion to enforce.

[20]Defendants presented testimony that 14 of the 16 schools identified by plaintiffs as racially identifiable schools actually attract

***13** Lastly, Plaintiffs' lack of objection to student attendance patterns in Defendants' Annual Reports prior to 1994 cannot be excused on the basis that the affirmative obligation to eradicate the effects of the prior de jure segregation lies solely with Defendants. Plaintiffs have been and continue to be active participants in this case since its inception.

Having entered a comprehensive order to desegregate the public schools of Hillsborough County, this Court has relied on both Plaintiffs and Defendants to monitor compliance with the desegregation order.[21] The position which Plaintiffs assert in the amended motion to enforce is inconsistent with plaintiffs' prior representations to this Court that the public school system was desegregated and plaintiffs' failure to object when these eight schools crossed the 50% threshold a number of years ago and became majority black schools. As discussed subsequently, plaintiffs also did not voice a similar objection when provided an opportunity to review and comment on the Task Force Plan adopted by this Court in its 1991 Consent Order.

Plaintiffs have not shown that Defendants are in violation of this Court's 1971 Order.

B. *The 1991 Consent Order*

Background

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a great deal more financial assistance as "Chapter 1" schools than other Hillsborough County schools. (T2-88-90)

[21]Defendants also point out that plaintiffs' current claim for attorney fees includes fees for "monitoring" the annual reports, among other things and that one of plaintiffs' attorneys testified that for each of the seventeen years, he "had to do the work necessary to determine whether the installment of the School Board's plan for the next succeeding year . . . moved forward, marked time, or moved backward." (doc. 689 p. 9 n. 2).

Under the plan in existence prior to the Court's 1991 Consent Order, single grade centers (consisting of sixth or seventh grade) bridged the transition from elementary school to junior high school. The single grade centers were created under the original desegregation plan.

Implementation of the middle school concept involved creating attendance "clusters" which grouped elementary and middle schools around the high school which those students would ultimately attend. One of the major objectives of the cluster plan was to have neighborhood schools while maintaining a desegregated school system, among other goals. (T2-80; Task Force Report, p. 10-11)

The cluster plan reduced cross-busing for students in the inner-city as well as the suburbs and utilized intra-cluster busing and magnet school busing as additional alternatives for desegregating the school system. (Task Force Report, p. 14).

The school district held extensive public meetings and hearings on the middle school plan which addressed, among other things, proposed attendance boundaries for the clusters. As a result of these meetings, as well as discussions with plaintiffs and their representatives, changes were made. For example, West Tampa parents at one hearing wanted West Tampa to be included in the Jefferson Cluster instead of the Plant Cluster and the school board agreed to that modification. (T2-60-68).

The middle school concept affected all schools within Hillsborough County, not simply the grades 5 through 9, because it created attendance clusters which did not exist previously. Thus, the Court recognized that implementation of the middle school grade structure necessarily required "modification of the Court's Orders in this action." Consent Order, p. 1.

***14** Designing the clusters required altering the attendance zones for some schools because there was not a perfect geographic fit for all the clusters. Ideally, each high school boundary would have included the necessary number of middle schools and elementary schools needed for each cluster. However, this was not the case with every school. When boundaries had to be changed, the School Board staff considered factors such as distances, enrollments, capacity and also the impact of the boundary change on racial enrollments. Whenever possible, staff tried to bring all the schools closer to the 20/80 ratio. (T2- 97-101) The School Board's desegregation monitor, Dr. Miliziano, terms the 16 schools at issue in plaintiffs' motion as "anomalies". (T2-101-102)

Disputed Issues of Interpretation

Plaintiffs contend that the 1991 Consent Order did not modify any provisions of the 1971 Order which were not explicitly addressed and required that there not be any schools where the percentage of black students exceeded 40%.

This position is contrary to the parties' conduct at the time the Task Force Report was under consideration. Dr. Stevens was retained as an educational expert by Plaintiffs to specifically review the middle school plan and determine whether it was consonant with the objectives of desegregation and to determine whether it imposed an unfair burden on the plaintiff class of pupils. (T1-98). There were several meetings and discussions between plaintiffs and defendants concerning various aspects of the proposal.

One concern of plaintiffs was that inner-city predominately black children were not assigned to a single cluster. As a result, an additional cluster was added to the plan for a downtown high school. (T2-65-66). There were certain other items that plaintiffs were adamant about including in the

middle school plan, including retaining one elementary school (Lockhart) in the inner city that was not a magnet school. (T2-77-79). Defendants incorporated this request into the plan. (T2-80). Plaintiffs also argued for a 40/60 instead of 20/80 black/white ratio for magnet schools and this request was also incorporated into the plan. (T2-83-85)

At no time during the negotiations over the middle school plan did Dr. Stevens or counsel for plaintiffs raise a concern about the projected attendance patterns reflected for any of the sixteen schools which are identified as racially identifiable schools, including the eight majority black schools, in plaintiffs' amended motion to enforce. (T2-82-83).[22] Nor did plaintiffs argue, as they do now, that defendants needed to adjust the racial balance at these schools to insure that black student enrollments did not exceed 40%.

The 1991 Consent Order states, in pertinent part:

> The report to be filed annually by April 15 shall also include a description of changes in facility utilization, student attendance, grade structure, or curriculum, etc. that are proposed to be implemented in the succeeding school year, and sufficient information relating to such

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[22]Five of the eight schools identified in plaintiff's motion were projected to have majority-black students under the cluster plan: Robles (76%), Edison (64%), Sulphur Springs (59%), Oak Park (58%), and Graham (58%). The others were: Cleveland (50%), Foster (39%), and Van Buren (27%) Seven of these schools are elementary schools; Van Buren is a junior high school. Also, two of the eight schools are each assigned to different clusters. Cleveland and Sulphur Springs are both in the Chamberlain Cluster; Whitter and Van Buren are both in the Northeast Tampa SHS Cluster; and Graham and Foster are both in the Hillsborough Cluster. (Task Force Report, p. 48-102)

> changes to permit the Court to determine their impact upon the maintenance of desegregated schools in Hillsborough County and the elimination of any lingering vestiges of prior discrimination from the school system. *The Court recognizes and anticipates that there will be modifications each year of the projected student assignment patterns contained in Appendix I to the Task Force Report to take account of demographic or other changes that occur. In making such modifications, the school district should seek to minimize (to the extent practicable) the number of schools which deviate from the system-wide student enrollment ratios (see Task Force Report, at p. 14).*

***15** Consent Order at 5-6 (emphasis added).

The pertinent section of the Task Force Report cited above is:

> The number of schools reflecting a ten or higher percent race ratio variance will increase from 36 to 46. The plan also increases the number of schools from 56 to 72 that will have an almost perfectly balanced race ratio with a student variance of five percent or less from the recommended 20/80% ratio.

With respect to the portion of the 1991 Consent Order highlighted above, Plaintiffs state that Defendants have a duty to minimize deviation from the race ratios (specified in the 1971 Order), any time new attendance zones under the cluster plan are implemented.

Defendants contend that the duty is triggered only when the zones are implemented in a manner that deviates from (modifies) the zones proposed in the Task Force Report. However, Defendants state that the duty is not triggered even as

to the Jefferson Cluster because it is being implemented in "relevant respects" as it was projected in the Task Force Report.

The Joint Pre-Evidentiary Hearing Statement (doc. 657) sets out the parties' respective positions.

As the Court knows, the 1991 Consent Order was entered pursuant to the stipulation of the parties. At the evidentiary hearing, plaintiffs' attorneys acknowledged that they drafted the Consent Order. (T1-63)

The Consent Order clearly provides that in making *modifications* to the projected student attendance patterns, the school district should seek to minimize, to the extent practicable, the number of schools which deviate from the system-wide student enrollment ratios. This interpretation, which has been followed by Defendants, is supported by the plain language of the underlined portion of the Consent Order read in context with the prior sentence.

Plaintiffs contend that each time a cluster is implemented, Defendants have a duty, as to each school in the cluster, to minimize the extent of any deviations from the system-wide ratios to the extent practicable regardless of whether any modifications are proposed which differ from the cluster plan approved by the Court in 1991.

This position is not only contrary to the language of the Consent Order which plaintiffs drafted, but it also overlooks the substantial planning which went into the Task Force Report approved by the court. The student attendance zones were mapped out for each cluster with street boundaries provided in nearly every case, including satellite zones. (Task Force Report, p. 40, 43, 46, 49-50, 53-56, 59-61, 64-65, 68, 71-72, 75-76, 79-80, 83-86, 89-90, 93, 96-97, 100, 103-104).

The cluster plan and proposed attendance zones received extensive public hearings before being finalized and approved by the school district. Plaintiffs were involved in this process. Plaintiffs were also provided a copy of the final Task Force Report and had ample time (more than two months) to present suggestions or objections concerning the student attendance zones proposed for each cluster. Plaintiffs, through Dr. Stevens, had some concerns and made a number of suggestions which were implemented by the school district. (T1-99- 102) However, it is undisputed that none of these suggestions involved altering the student attendance zones for those schools which were projected to have black student enrollments of 40% or more, the very situation addressed in plaintiffs' instant motion. (T1-140; T2-103)

***16** One of the objectives of the Task Force Plan was minimizing the number of racially identifiable schools and racial disparity in transportation of students. (T2-93) In accomplishing this goal, school board officials proceeded on the assumption that it was better to bring more schools in line with the district-wide racial enrollment even if that meant that the racial imbalance might increase at certain schools.

This approach certainly had plaintiffs' implicit, if not express, endorsement because the Task Force Plan was incorporated into the Consent Order which the parties submitted to this Court.

Thus, the Task Force Report stated that under the plan, the "number of schools reflecting a ten or higher percent race ratio variance will increase from 36 to 46" while the plan "also increases the number of schools from 56 to 72 that will have an almost perfectly balanced race ratio with a student variance of five percent or less from the recommended 20/80% ratio." (Task Force Report, p. 14).

On the next issue of the interpretation of the Consent Order, defendants' argument--that there may be *de minimis* modifications to the cluster plan which do not require consideration of the effect on race ratios--is not supported by the language of the order. Thus, the modifications to the Jefferson Cluster proposed in 1993 required Defendants to consider the effect of the modifications on the student attendance patterns under certain circumstances.

The Court must next resolve the parties' disagreement over the nature and scope of Defendants' obligations. Defendants are directed that "[i]n making such modifications, the school district should seek to minimize (to the extent practicable) the *number of schools* which deviate from the system-wide student enrollment ratios (see Task Force Report, at p. 14)." Consent Order at 5-6 (emphasis added).

Plaintiffs argue that such language is to be read as requiring the School Board to minimize the extent to which any school deviates from the system-wide ratio, even if that action would increase the extent of the deviation of another school in the cluster, so long as neither school becomes "racially identifiable". Defendants contend that they are only required to take actions that minimize the number of schools which deviate from the system-wide ratio. Alternatively, Defendants contend that even if the language is read as speaking to the magnitude of the deviation, it does not require reduction of deviation at one school if an increase in the extent of deviation from the system-wide ratio would result at another school.

Plaintiffs' interpretation is once again contrary to the clear language of the provision which they drafted. Moreover, because a consent order is to be construed for enforcement purposes basically as a contract, reliance upon certain aids to construction is proper, as with any other contract. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975). Therefore,

even if the language were ambiguous, the Court, in applying well-established rules of construction, would construe the ambiguity against Plaintiffs as the drafters of the proposed Consent Order.

*17 Thus, Defendants' duty under the 1991 Consent Order as to attendance zone modifications is to minimize the number of schools that deviate from the 20/80% race ratios, not the extent to which the schools deviate. Plaintiffs not only agreed to this, but drafted the Consent Order this way.

In fact, prior to the parties' disagreement over implementation of the Jefferson Cluster, Dr. Stevens met with School Board representatives concerning a staff proposal to modify another middle school cluster, the East Bay Cluster.

Defendants proposed to convert one of the new elementary schools, B.L. Bing, to a middle school instead of Progress Village due to the extremely high construction bids for converting Progress Village to a middle school. Dr. Stevens objected to the plan because it would result in more schools deviating from the 20/80 ratio than agreed upon in the Task Force Report. Because of this opposition, the School Board decided not to seek court approval for the modification which would have resulted in a savings of approximately six or seven million dollars in construction costs. (T2-142-145).

This testimony is significant because it demonstrates that plaintiffs' current interpretation of the "duty to minimize" language in the 1991 Consent Order is of recent vintage and is contrary to the parties' prior dealings in discussing proposed modifications to the Task Force Plan.

There is no evidence that the modifications to the Jefferson Cluster Plan proposed for the 1994-1995 school year increased the number of schools within the cluster which

deviated from the district-wide 20/80 norm set out in the 1971 Order and adopted by reference in the 1991 Consent Order.

West Tampa Elementary

Even if plaintiffs' interpretation of the minimization duty is correct, there is no "practicable" method to reduce the black enrollment percentage at West Tampa Elementary School.

Because the Jefferson Cluster was implemented sooner than projected, there was no middle school ready for all of the sixth-graders. Defendants proposed to retain some of the sixth-graders--those who walked to school--at West Tampa while sending those who the 1994 school year until the middle school that the students were assigned to was ready. Those students who walked to school were mostly black and those who were bused were mostly white. (T1-75; 182-183).

The main reason for the increased number of black students at West Tampa since projected in 1991 is the special assignments granted parents who have after- school care arrangements for their children nearby. Many of the West Tampa parents work and utilize the boys' and girls' club within the attendance area. (T2-128)

Plaintiffs' consultant, Dr. Stevens, conceded that without these special assignments, the black student population at West Tampa would be about 41%. (T2-113) Dr. Stevens proposes denying special assignment requests, including those made on hardship grounds, if necessary to maintain black enrollments below 40%. As previously stated, this would violate this Court's 1971 Order directing that such requests be considered without regard to race unless made for the purpose of avoiding desegregation.

***18** Also, Dr. Stevens' plan to alter the attendance zones for West Tampa would involve a segment of students crossing a major four-lane highway (Columbus Drive) to walk to school, which would require transporting those students.[23] Even then, some students would elect to walk to school and crossing Columbus Drive would pose a significant hazard to them. In addition, a satellite which Dr. Stevens proposes to use is already assigned to another cluster. (T2-129-137; 172-175; 200).

For these reasons alone, plaintiffs' alternative to the temporary measure of leaving some sixth-graders at West Tampa is not practicable, even if the 1991 Consent Order did impose a duty to minimize the extent of deviation at that school from the system-wide ratio.

While Defendants have a constitutional obligation to render decisions that further desegregation, *see Harris*, 968 F.2d at 1094-95, "[i]t is the maximum practicable desegregation that the law requires." *Stell*, 860 F. Supp. at 1580 (citation omitted).

Plaintiffs have not shown that Defendants are in violation of the 1991 Consent Order. The Third Annual Report with the proposed modifications to the Jefferson Cluster should be approved.

Future Cluster Implementations Beyond 1995-1996

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[23]The proposal which Dr. Stevens presented at the evidentiary hearing was not the same suggestion that he made when raising his concerns with Dr. Miliziano and other school board staff almost a year earlier prior to the filing of the Third Annual Report. (T1-196).

The eight schools addressed in plaintiffs' motion with black student enrollments over 50% are: Robles, Edison, Sulphur Springs, Oak Park, Graham, Cleveland, Foster, and Van Buren. All but the last three were projected to have black student enrollments over 50% when the Task Force Plan was adopted.[24]

The clusters these schools belong to have not been implemented yet by the School Board. Under the 1991 Consent Order Defendants' obligations to adjust the race ratios at these schools do not arise unless there are *modifications* to clusters to which these schools are assigned *and* those modifications *increase the number of schools* which deviate from the system-wide ratio.

The Third Annual Report submitted on April 15, 1994 indicates that the percentage of black students attending these schools is higher than projected in 1991, and significantly so in some cases. For example, Robles was projected to have 76% black students and had 90% black students in 1993. Edison (64%) had 74%. Sulphur Springs (59%) had 70%. Oak Park (58%) had 66%. Graham (58%) had 63%. Cleveland (50%) had 59%. Foster (39%) had 57%. Whitter (40%) had 56%, and Van Buren (27%) had 50%. The Fourth Annual Report submitted two months ago shows additional increases in the percentage of black students at these schools.

These statistics may persuade this Court that a prospective modification of the 1991 Consent Order is in order, particularly because it was acknowledged in the Task Force Report that planning beyond the 1995-1996 year "must be viewed as tentative because more information is needed to

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[24] *See* footnote 22, *supra.*

make accurate predictions." 1991 Consent Order (citing Task Force Report, p. 26).

Although the motion to enforce should be denied because there have been no violations of the Court's orders, this Court may wish to consider whether, commencing with the 1996-1997 school year, it is reasonable to require Defendants, when implementing a particular cluster or clusters on an annual basis, to establish that as to any school within the particular cluster having majority-black student enrollments (or whatever measure this Court may identify) that the racial imbalance is the result of demographic or other factors other than official school board policy. If the Defendants are able to meet this burden, consistent with the *Freeman* decision, then the inquiry would end.[25] If Defendants were unable to meet this burden, then they would have to show that the schools in question have been desegregated to the maximum extent practicable.

***19** If the Court were inclined to consider such action, it would be best to impose on the parties the requirement of a good faith effort to resolve any disputed factual issues, including use of mediation. The Court may also wish to

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[25]For example, Plaintiffs point to Robles as the paradigm of a racially identifiable school. While the statistics concerning racial enrollments are undisputed, Defendants point out that Robles has not had any boundary changes since 1971. Despite acknowledging this fact, plaintiffs' consultant, Dr. Stevens, was unwilling to agree that demographic changes in the residential area surrounding the school are responsible for the current racial enrollments. Dr. Stevens has not done any studies on the practicability of readjusting the student enrollment at that school (or any of the other schools identified in plaintiffs' motion) except for West Tampa. However, he suggested that "part of the solution may lie in an out-of cluster assignment" when it comes time to bring on line the cluster to which Robles is assigned. (T1-215-220).

consider appointing an outside expert to advise the Court on issues relating to Defendants' desegregation efforts. As a result of the amended motion to enforce, it may be that the parties' respective desegregation experts have become somewhat entrenched and proprietary in their positions.

At some point in time, the Court will have to determine whether the school system of Hillsborough County has achieved unitary status.[26] The issues the Court will be called on to decide at that time arguably may be more focused and easier to resolve if these measures are implemented.

However, it must be emphasized that the issues of modifying the 1991 Consent Order for future cluster implementations and appointing an independent monitor or desegregation expert were not addressed at the evidentiary hearing and are offered only as additional factors the Court may wish to consider.

III. CONCLUSION

For the foregoing reasons, I recommend that Plaintiffs' Amended Motion to Enforce Court Order and Consent Order and for Further Relief (doc. 601) be denied and the Third Annual Report filed by Defendants in 1994 be approved.

NOTICE TO PARTIES

Failure to file and serve written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date it is served on the parties shall bar an aggrieved party from a *de novo* determination by

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[26]At closing argument, Defendants' counsel indicated that the a motion to determine unitary status had not been filed because the School Board had not made that request.

the District Court of issues covered in the report, and shall bar the party from attacking on appeal factual findings in the report accepted or adopted on appeal by the District Court except upon grounds of plain error or manifest injustice. 28 U.S.C. § 636(b)(1)(C); Local Rule 6.02; *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir.1982) (*en banc*).